SUBMITTED

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted]57

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

CHARLES W. REED AND DORA REED, HIS WIFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

[redacted]

(32,816)

# (30,818)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1923**

# No. 1008

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

*vs.*

CHARLES W. REED AND DORA REED, HIS WIFE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 17, 1924

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[fol. a] IN THE

**SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHATCOM**

CHARLES W. REED and DORA REED, His Wife, Plaintiffs,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, a Corporation, and Great Northern Railway Company, a Corporation, and Walker D. Hines, as Director General of Railroads, Defendants.

[File endorsement omitted.]

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[fol. 1] RETURN OF SERVICE UPON CORPORATION—Filed June 14, 1919

[Title omitted]

I, John Stringer, Sheriff of King County, State of Washington, do hereby certify that I received the annexed summons on the 23rd day of May, 1919, and personally served the same on the 23rd day of May, 1919, on Great Northern Railway Co., it being one of the defendant- named in said summons, by delivering and leaving with F. V. Brown, the statutory agent of said corporation, personally in said King County, a copy of said Summons, and therewith a copy of the Complaint in the action named in this Summons.

Dated this 23rd day of May, 1919.

John Stringer, Sheriff, by N. A. Carino, Deputy.

| | |
|---|---|
| Service ..... | $.60 |
| Travel ..... | .20 |
| Total..... | $.80 |

[File endorsement omitted.]

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[fol. 2] RETURN OF SERVICE OF DEFENDANT IN PERSON—Filed June 14, 1919

[Title omitted]

I, John Stringer, Sheriff of King County, State of Washington, do hereby certify that I received the annexed sumons on the 23rd day of May, 1919, and personally served the same on the 23rd day of May, 1919, on Walker D. Hines, as Director General of Railroads, he being one of the defendants named in said summons, by deliv-

ering to and leaving with F. V. Brown, Gen. Attorney said defendant personally in said King County, a copy of said Summons and therewith a copy of the complaint in the action named in said Summons.

Dated this 23rd day of May, 1919.

John Stringer, Sheriff, by N. A. Carino, Deputy.

| | |
|---|---|
| Service ..... | $.60 |
| Travel ..... | — |
| | $.60 |

[File endorsement omitted.]

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[Title omitted]

[fol. 3] SUMMONS—Filed June 14, 1919

The State of Washington to St. Paul, Minneapolis & Manitoba Railway Company, a corporation; Great Northern Railroad Company, a corporation; and Walker D. Hines, as Director General of Railroads, Defendants:

You, and each of you, are hereby summoned and required to appear within twenty (20) days after the service of this summons upon you, exclusive of the day of service, if served within the State of Washington, and within sixty (60) days after the service of this summons upon you, exclusive of the day of service, if served outside the State of Washington, and answer the complaint, and serve a copy of your answer on the person whose name is subscribed to this summons, at the place specified following his said name, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demands of the complaint, a copy of which is herewith served upon you.

Walter B. Whitcomb, J. W. Romaine, Attorneys for Plaintiffs.

Office and Post-Office Address:
411-13 Sunset Building,
Bellingham, Whatcom County,
Washington.

[File endorsement omitted.]

[fol. 4] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

COMPLAINT—Filed Jun. 14, 1919

Plaintiffs complain of defendants and allege:

I

That the defendant, St. Paul, Minneapolis & Manitoba Railway Company now is and at all the times hereinafter mentioned has been a corporation organized, created and existing under the laws of the State of Minnesota.

II

That the defendant, Great Northern Railroad Company, now is and at all the times hereinafter mentioned has been a corporation organized, created and existing under the laws of the State of Minnesota.

II-A

That by proclamation of the President of the United States, dated March 29, 1918, in pursuance of an Act of Congress of March 21, 1918, entitled: "An Act to Provide for the Operation of Transportation Systems While under Federal Control, for the Just Compensation of their Owners, and for Other Purposes" the United States took over the operation and control of the said defendants, St. Paul, Minneapolis & Manitoba Railway Company and Great Northern Railroad Company, and the said defendant, Walker D. Hines, was duly appointed Director General of Railroads, and of said defend-[fol. 5] ants, and now is the duly qualified and acting Director General of Railroads of the United States.

III

That the plaintiffs, Charles W. Reed and Dora Reed, now are and at all times hereinafter mentioned have been husband and wife.

IV

That the plaintiff, Charles W. Reed, was born in the State of Illinois, February 15, 1860; that he now is and at all the times hereinafter mentioned has been a citizen of the United States, over twenty-one (21) years of age, and was not, at the time he settled upon the land hereinafter mentioned, nor at the time he filed thereon in the United States Land Office, at Seattle, Washington, nor at any time since, nor is he now, the owner of any real estate other than that herein described, and was in all respects qualified to make entry upon unappropriated public lands of the United States subject to entry as a homestead.

V

That on the 1st day of September, 1901, and at all times thereafter, W. J. Tincker was a citizen of the United States, over the age of twenty-one (21) years, not the owner of other real estate, and was duly qualified to settle upon, enter and patent unappropriated lands of the United States, under the Homestead Laws of the United States;

VI

That in the month of September or October, 1901, the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3) Township thirty-nine (39) North of Range Six (6) East of Willamette Meridian, Whatcom County, State of Washington, was unappropriated public lands of the United States, subject to settlement, entry and patent under the Homstead Laws of the [fol. 6] United States; that in the month of September or October, 1901, the said W. J. Tincker squatted and settled upon the Northwest quarter (N. W. ¼) of Section three (3) Township Thirty-nine (39) North of Range Six (6) East of Willamette Meridian, including the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3) which said land was at that time unsurveyed; that he settled and squatted upon the said land with the purpose and intention of holding the same as a homestead under the laws of the United States, and of filing and perfecting his title thereto under the said laws; that in pursuance of said intention and in compliance with the Laws of the United States in such cases made and provided, he posted notice of his rights and claims to the said land upon the same, and that his residence thereon was continuous from his said first settlement down to and including the 1st day of August, 1906; that between the 1st day of February, 1902, and the 1st day of April, 1902, the said W. J. Tincker laid and constructed the foundation for a cabin upon the said Northwest quarter (N. W. ¼) of said Section three (3), and built and constructed a trail, and cleared land and made other improvements upon the said Northwest quarter (N. W. ¼) of said Section three (3);

That on or about August 1, 1906, the said W. J. Tincker sold, conveyed and relinquished all his right, title, claim and interest in and to the said Northwest quarter (N. W. ¼) of said Section three (3) to Walter M. Smithey; that the said Walter M. Smithey then and there was a citizen of the United States, over the age of twenty-one (21) years, and duly qualified homesteader under the laws of the United States, and the said Walter M. Smithey immediately went into possession of the said Northwest quarter (N. W. ¼) of said Section three (3), took up his residence thereon for the purpose of settling, holding, claiming and filing thereon as a homestead, and [fol. 7] of perfecting his title thereto, and that he continued his said residence and possession of the said property to November 24, 1906; that between the said August 1, 1906, and November 24, 1906, the said Walter M. Smithey commenced the construction of a cabin

on the Southwest quarter (S. W. ¼) of the said Northwest quarter (N. W. ¼) of said Section three (3), constructed and made trails on the said Northwest quarter (N. W. ¼) of said Section three (3), and upon the Southwest quarter (S. W. ¼) thereof, and made other improvements upon the said land;

That on the 24th day of November, 1906, said Walter M. Smithey sold, conveyed and relinquished all his right, title and interest in and to the Southwest quarter (S. W. ¼) of the Northwest Quarter (N. W. ¼) and the Northwest quarter (N. W. ¼) of the Northwest quarter (N. W. ¼) (also known as Lot four (4) of said Section three (3), and all improvements thereon, to the plaintiff, Charles W. Reed, who immediately thereupon entered, settled and squatted upon the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3) with the purpose and intention of becoming a homesteader and claiming the same as a homestead under the laws of the United States, and of filing upon and entering the same as such, and of perfecting the title thereto, and that he has resided upon said land, with his family, continuously since the said 24th day of November, 1906; that in the said month of November, 1906, the said plaintiff, Charles W. Reed, began the construction of a house upon the said Lot Four (4), in said Section three (3), and shortly thereafter completed the same, and ever since said date has occupied the same, with his family, and that continuously since said time he has occupied, cultivated and made the *the* said Southwest quarter of the Northwest quarter (S. W. ¼ of N. W. ¼) of said Section three (3) his home, with the purpose and intention of claiming the same as a homestead under the laws of the United States, and has never relinquished or forfeited or surrendered his rights or claim thereto.

[fol. 8]

VII

That a Plat of Survey of Township thirty-nine (39) North Range six east (6 E.) Willamette Meridian, of the land District of Seattle, Washington, was filed in the local land office on February 6, 1907; that prior to the filing of the said Plat, and on May 5, 1902, and at the time when the said W. J. Tincker was in the possession and occupancy of the said land, and claiming to hold the same as a bona fide settler and homesteader, the said defendant, Saint Paul, Minneapolis & Manitoba Railway Company filed its List 43 (New Serial 024450), describing a tract of land which it claimed would be described when surveyed as the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3), in said Township and Range, under an Act of Congress of August 5, 1892, 27 Statutes, 390, entitled "An act for Relief of Settlers on certain lands in the States of North and South Dakota," and on June 21, 1902, the said St. Paul, Minneapolis & Manitoba Railway Company filed in said Land Office a Rearranged List describing the same land; that accompanying the said original list No. 43 and the re-arranged list above mentioned was the affidavit of Mr. Thomas R. Benton, in support thereof, executed in Ramsey County, Minne-

sota, on March 22, 1902, in which it is alleged that the said lands "are vacant, unappropriated and are not indicated mineral or reserve lands, and of character contemplated by said Act"; that the said affidavit was untrue and false at the time when the same was made and at the time when the said list was filed, and at all times thereafter in the following particular, to-wit: That the said land was not vacant and was not unappropriated at said times, but was, in fact, occupied and possessed by the plaintiffs' grantor, W. J. Tincker, and had been appropriated by him for the purposes hereinabove mentioned; that thereafter, on February 23, 1907, sub-
[fol. 9] sequent to the filing of the Plat of Survey hereinabove mentioned the said St. Paul, Minneapolis & Manitoba Railway Company filed a Supplemental List 43-A, accompanied by another affidavit of Mr. Benton, to the same effect, and alleging therein that at that time, to-wit: February 23, 1907, the said lands were still vacant and unappropriated; and plaintiffs allege that this affidavit also was false and untrue in that the said lands were not vacant and unappropriated but were at that time actually occupied, in the possession of, claimed and appropriated by this plaintiff, Charles W. Reed, as hereinabove mentioned.

## VIII

That on February 6, 1907, the plaintiff Charles W. Reed, filed in the Land Office at Seattle, Washington, his application to enter the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) and the said Lot four (4) and the West half (W. ½) of the Southwest quarter (S. W. ¼) of said Section three (3) as and for a homestead, which said application was received by the Register and Receiver of the said Seattle Land Office, without objection, and the said plaintiff was not informed by the said Register or Receiver, nor by anyone else, that the said land had been selected by the said St. Paul, Minneapolis & Manitoba Railway Company, nor had he any knowledge or notice thereof at that time, nor at any time thereafter until December 1st, 1909.

That on or about March 11, 1907, the Register and Receiver of the Seattle Land Office transmitted to the General Land Office at Washington, D. C., the said supplemental list filed February 23, 1907, with a certificate thereto, executed by the said Register and Receiver reciting: "Nor is there any prior homestead or other valid claim to any portion of said lands on file or of record in this office;" that the said certificate did not show the filing of claim of plaintiff;
[fol. 10] that if it was intended as a certificate that there were no other claims to the said land it was false and fraudulent as to this plaintiff, for the reason that the form of certificate in such case required by the General Land Office called for a certificate as to whether there were any homestead or other valid claims to any portion of said lands on file or of record at that time in the District Land Office, and the Register and Receiver of the Seattle Land Office inserted in ink in said certificate the word "prior," thus altering the

character of the certificate required from Registers and Receivers, and in effect adjudicating the question as between plaintiff and the said Railway Company as to which had a prior right, and without notice to plaintiff, and without giving him any right or opportunity to be heard thereon, while, as a matter of fact, at that time the plaintiff's homestead application was then on file in the Seattle Land Office, and he was claiming the said land as the successor in interest of the said W. J. Tincker and Walter M. Smithey; that the plaintiff, Charles W. Reed, was not notified by the Land Office as required by law, or by any other person, nor had he any notice that his claim to the said land had been adjudged to be junior to the said St. Paul, Minneapolis & Manitoba Railway Company's selection list, and he was thus deprived of the right and opportunity to present his claim of priority and the evidence of his settlement and improvements, and of the settlement and improvements of his grantors, and of the right to present to the Land Office his petition and evidence to have the claim, application and patent of the said St. Paul, Minneapolis & Manitoba Railway Company cancelled and set aside and adjudged to be junior to the claim of this plaintiff; that the said Register and Receiver of the Land Office, in certifying the said list of the defendant, St. Paul, Minneapolis & Manitoba Railway Company, to the General Land Office, without mentioning the application and claim of the plaintiff, Reed, thereto, was in effect, [fol. 11] a fraud upon this plaintiff and his rights; that said St. Paul, Minneapolis & Manitoba Railway Company's selection list, which became Approved List No. 33, and Patent No. 29, dated April 13, 1908, and recorded at page 189 of Volume 37 of Patents, was issued to the said defendant thereafter and the said patent was issued without notice before its issuance to the plaintiff, Charles W. Reed, and without any knowledge or notice of any kind on his part of the said defendant's application therefor, and plaintiff was not notified of the issuance thereof, nor was he given any notice whatsoever, as required by law, that the claim of the said defendant had been adjudged to be prior and superior to his own, and same was issued by mistake for the reason that the General Land office and the Department of the Interior had no knowledge or notice of the rights, application or claim of the plaintiff to the said land, and because of the untrue and misleading affidavit of the said Thomas R. Benton, and of the said Certificate of the Register and Receiver of the Seattle Land Office, and the sole proof received by the General Land Office upon the application of the said St. Paul, Minneapolis & Manitoba Railway Company to patent the said land, that the same was vacant and unappropriated was the affidavit of the said Thomas R. Benton, and affiant further alleges that the said affidavit of the said Thomas R. Benton was made without personal knowledge on his part as to whether the said land was vacant or unappropriated or not, and affiant is informed and believes and therefore alleges that the said Thomas R. Benton never saw the said land prior to the making of the said affidavits and had no personal knowledge as to whether the same was vacant or appropriated or not.

## IX

That on or about October 1, 1909, one John Carlson having theretofore filed homestead application upon the said Southwest [fol. 12] quarter (S. W. ¼) and one Henry W. Parrott, having thereto- filed contest affidavit against the entries of the said Carlson and this plaintiff, Reed, notices were issued by the said Seattle Land Office citing the plaintiff and the said Carlson and said Parrott to appear for hearing before the Register and Receiver of said Seattle Land Office on December 1, 1909; that on December 1, 1909, this plaintiff, Charles W. Reed, appeared before the Register and Receiver of the Land Office at Seattle, Washington, and the said Henry W. Parrott appeared by attorney, and the said John Carlson made default, and when the said matter, on said day, came on for hearing, the plaintiff was informed for the first time, by the Register of the said Land Office that the said land had been selected by the said defendant, St. Paul, Minneapolis & Manitoba Railway Company and that it had been patented to the said defendant, and that the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3) would not be included because of that fact, and when the plaintiff asked that the said defendant be brought in, he was informed by the Register of the Land Office that it could not be and would not be brought in because the patent had already been issued. When an explanation was demanded as to how it could be patented to the said defendant without notice, either before or after, to the plaintiff, the plaintiff was informed that patent had been issued by mistake by the Assistant Commissioner of the General Land Office, when all the records in regard to this land were in Washington, D. C.; that the said contests above mentioned were decided adversely to the said John Carlson and Henry W. Parrott and the said plaintiff, Charles W. Reed, then and there made due and formal proof of his residence and improvements upon said land, and his statements in regard thereto were in all things corroborated by four other witnesses.

[fol. 13] That shortly after learning that the said land had been patented to the said defendant, and on February 10, 1910, the plaintiff, Charles W. Reed, lodged a protest with the United States Land office against the patenting of the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3) said Township and Range, to the said defendant St. Paul, Minneapolis & Manitoba Railway Company, and asked for a hearing between himself and the Company with respect thereto, and for cancellation of the said defendant's patent, and that such proceedings were had in the said matter that it finally came before the Secretary of the Interior, who, on January 16, 1911, rendered a decision therein in which he said:

"I am of the opinion that there was no such error in the issuance of patent to the Railway Company as would justify this Department in requesting the Attorney General to institute suit for the

cancellation of the patent. Had Reed presented all the facts with respect to his settlement claim at the date of the tender of his homestead application undoubtedly patent could not properly have issued to the Railway Company without affording him an opportunity to be heard. He is now before the Department asking its intervention against the consequence of his own laches",

and plaintiff alleges that the said decision is contrary to law, is unfair and unjust to the plaintiffs, and that the said decision was rendered in mistake, both of fact and of law, for the following particulars, to-wit:

1. That the selection of the defendant Railway Company of the said land and the issuance of patent thereon were based upon the false affidavit of Thomas R. Benton as herein alleged, and that the said land was not subject to entry, and not subject to be scripped by the said Railway Company for the reason that it was at the time of its selection and at all times thereafter actually occupied by a bona fide settler, namely, this plaintiff, Charles W. Reed, or his grantors.

2. That the Register and Receiver of the Seattle Land Office had falsely certified to the General Land Office that there were no prior [fol. 14] homestead or other valid claims to any portion of said land.

3. That the plaintiff, Charles W. Reed, was never notified by the Land Office of any adjudication by the Seattle Land Office, or by the General Land Office, that the claim of the said defendant, St. Paul, Minneapolis & Manitoba Railway Company was prior to plaintiff's said claim, nor was he notified that the said land had been patented to the said defendant Railway Company.

4. That the said defendant was not notified and had no knowledge or notice whatsoever of the claim of the said defendant, St. Paul, Minneapolis & Manitoba Railway Company until the very day when he was in the office for the purpose of making his final proof, with his witnesses all there present, and that no opportunity to then present any evidence in regard to the claim of the said defendant Railway Company, or the settlement and claim of his grantors thereon was given him, and when he then and there demanded that the said defendant Railway Company be brought in and he be permitted to produce his proof, and to contest the said matter with the said Railway Company, he was, by the Register and Receiver of the Land Office at Seattle, Washington, told that the matter was already determined; that the patent had issued to the said defendant Railway Company, and that his application was dismissed as to them, and that he could not be heard upon the subject.

That by reason of these facts the Secretary of the Interior was mistaken both in law and in fact in his conclusion that this plaintiff had been guilty of any laches in asking to have the patent of the

said Railway Company cancelled, and by reason of said decision this plaintiff was wrongfully denied the title to the said land, and the [fol. 15] plaintiff further alleges that it was because of the misconduct of the Register and Receiver of the Seattle Land Office that notice of this conflict was withheld from the plaintiff until the land had been patented to the defendant Railway Company.

That thereafter the said plaintiff, Charles W. Reed again petitioned the United States Land Office to institute suit to have the patent theretofore issued to the said St. Paul, Minneapolis & Manitoba Railway Company cancelled, and such proceedings were had that on the 18th day of April, 1916, the Assistant Secretary of the Interior rendered decision in said matter in which it is said:

"The above land was selected May 5, 1902, while still unsurveyed, by the railway company, under the act of August 5, 1892 (27 Stat. 390). Upon February 6, 1907, Reed filed his homestead application for this tract, together with certain other adjoining subdivisions, asserting that he had settled thereon November 24, 1906. The present petition asserts that the register and receiver failed to transmit his homestead application to the General Land Office until April 30, 1908, and that the issuance of patent while his application was pending was erroneous.

Reed's allegations of settlement at the time of presenting his application placed the time thereof as subsequent to the filing of the railway company's selection. At the time of the issuance of patent therefor, in so far as the facts were disclosed by Reed, such issuance was correct. Upon June 19, 1911, however, Reed filed affidavits to the effect that one Tincker had settled upon the land in 1901, prior to the railway company's selection. This showing, however, was not made until after the patent had been issued to the railway company.

"In its decision of January 16, 1914, the Department stated as follows:

'I am of the opinion that there was no such error in the issuance of patent to the Railway Company as would justify this Department in requesting the Attorney General to institute suit for the cancellation of the patent. Had Reed presented all the facts with reference to his settlement claim at the date of the tender of his homestead application, undoubtedly patent could not properly have issued to the Railway Company without affording him an opportunity to be heard. He is now before the Department asking its intervention against the consequences of his own laches.

If, under the facts alleged in the pending petition, Reed has a Superior right to the land under consideration, his remedy would appear to lie in an action in the courts against the Railway Company.'"

That the Assistant Secretary of the Interior was mistaken in law and in fact for all of the reasons above stated as to the decision of January 16, 1914, and for the further reason that when the plaintiff, [fol. 16] Reed, offered his final proof upon his application for patent of said land, he was informed by the Register and Receiver of the

Seattle Land Office that his application for patent of the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3) could not be considered and would not be considered; that the land had already been patended to the defendant, St. Paul, Minneapolis & Manitoba Railway Company, and that his proof could not be accepted as to that tract at that time; and when he demanded that the said defendant Railway Company be brought in and that his proof be taken, he was informed that the land having already been patented to the defendant, that the land Office had no right or authority to bring in the said defendant Railway Company, and therefore the plaintiff was never given an opportunity to make his proofs as to his settlement upon the said lands; and for all these reasons the decision of the said Land Office and of the Secretary of the Interior is contrary to law and contrary to fact, and does a violent wrong to the plaintiff, and he has been deprived of the right or opportunity to ever present his proofs or his application for the patent of the said land.

X

That the plaintiff, Charles W. Reed, with his wife, Dora Reed, and his family, have, since the 24th day of November, 1906, remained in the possession of the said land; have each year farmed the same; have continued in the occupancy thereof; have built a house thereon 10 x 20 feet, with an addition 12 x 16 ft., a wood shed, tool house, root house, and barn 12 x 16 feet; that he has cleared about one and a half acres of said land and has four acres slashed; that he has built six miles of trial; that he has each year since 1906 raised a crop upon the said land, and that he has planted fruit trees thereon that are now bearing; and that he has at all time main-
[fol. 17] tained his residence upon the said land; made it -is home, and intends to continue so to do.

XI

That at all times since the month of October, 1901, the plaintiff and his grantors have been in the continuous, open exclusive, notorious and hostile possession of the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3), Township thirty nine (39) North, Range six (6) East, W. M., Whatcom County, Washington, under claim of right and color of title.

XII

That the said defendant, St. Paul, Minneapolis & Manitoba Railway Company has conveyed the said land to the defendant Great Northern Railroad Company, which claims some interest therein.

Wherefore, plaintiff prays:

1st. That the plaintiffs' title to the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3) Township thirty-nine (39) North, Range six (6) East W. M. What-

com County, Washington, be quieted, and plaintiffs be decreed to be the owner of the said land, and that the defendants have no interest therein.

2nd. That the defendants be adjudged to hold the legal title of the said land in trust for the plaintiffs, Charles W. Reed and his wife, Dora Reed, as a community of husband and wife, and that the judgment and decree of this court be made herein directing and requiring that the said land be conveyed to said plaintiffs.

3rd. That plaintiffs have judgment against defendants for their costs and disbursements in this action.

4th. For such other and further relief as to the Court may seem just in the premises.

Walter B. Whitcomb, J. W. Romaine, Attorneys for Plaintiff.

[fol. 18] Jurat showing the foregoing was duly sworn to by Chas. W. Reed omitted in printing.

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[fol. 19] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

DEMURRER OF GREAT NORTHERN RAILWAY COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, TO THE COMPLAINT —Filed June 14, 1919

The defendants Great Northern Railway Company, erroneously designated as Great Northern Railroad Company, and Walker D. Hines, as Director General of Railroads, demur to the complaint, upon the grounds:

1. That the court has no jurisdiction of the subject matter of the action.

2. That the plaintiffs have no legal capacity to sue.

3. That there is a defect of parties plaintiff.

4. That there is a defect of parties defendant.

5. That several causes of action have been improperly united.

6. That the complaint does not state facts sufficient to constitute a cause of action.

7. That the action has not been commenced within the time limited by law.

F. V. Brown, A. J. Langhorn, Attorneys for Great Northern Railway Company and Walker D. Hines, Director General of Railroads.

[File endorsement omitted.]

[fol. 20] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

MEMORANDUM OPINION ON DEMURRER—Filed September 22, 1919

The Court is of the opinion that the complaint states a cause of action. The complaint alleging that the plaintiff has remained in possession of these lands during the times mentioned in the complaint, the statute of limitations has not run against the plaintiff. The demurrer will be overruled.

William H. Pemberton, Judge.

[File endorsement omitted.]

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[fol. 21] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

ANSWER AND DISCLAIMER OF WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS—Filed October 23, 1919

Answering the complaint herein, the defendant, Walker D. Hines, Director General of Railroads, states that he has not and does not claim and at the time of the commencement of this action did not have or claim to have any right or interest in any of the matters in question in this suit, and he disclaims all right, title and interest, legal and equitable, in any of said matters. That this defendant was not applied to by the plaintiffs for a disclaimer prior to the filing of the complaint, and this defendant says that if he had been applied to by the plaintiffs before the filing of the complaint, he would have disclaimed all such right, title and interest.

Wherefore, defendant prays that said action be dismissed as against him with costs.

F. V. Brown, Thomas Balmer, Attorneys for Defendant Walker D. Hines, Director General of Railroads.

302 King Street Passenger Station, Seattle, Washington.

[fol. 22] Jurat showing the foregoing was duly sworn to by Thomas Balmer omitted in printing.

We hereby acknowledge service of the foregoing disclaimer and the receipt of a true copy thereof, this 23 day of Oct. 1919.

Walter B. Whitcomb, Attorneys for Plf.

[fol. 23] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

ANSWER AND CROSS COMPLAINT OF DEFENDANT, GREAT NORTHERN RAILWAY COMPANY—Filed October 23, 1919

The Defendant, Great Northern Railway Company, answers the Complaint as follows:

I

It admits Paragraphs I and II.

II

Answering Paragraph II-A, it admits that the defendant, Walker D. Hines, is the duly qualified and acting Director General of Railroads of the United States, under and by virtue of the Act of Congress and Proclamation mentioned in said paragraph, and as such in possession and control of the lines of railroad owned by the defendant, Great Northern Railway Company, in the United States of America, but denies all other allegations contained in said paragraph.

III

This defendant denies that it has any knowledge or information sufficient to form a belief, as to the allegations of paragraph III.

IV

This defendant denies that it has any knowledge or information sufficient to form a belief, as to the allegations of Paragraph IV.

[fol. 24]

V

This defendant denies that it has any knowledge or information sufficient to form a belief, as to the allegations of Paragraph V.

VI

Answering Paragraph VI this defendant admits that in the months of September and October, 1901, the Southwest quarter of the Northwest quarter of Section three (3), Township Thirty-nine (39) N. R. 6 E. W. M. was unappropriated public land of the United States subject to entry under the homestead laws; denies that in September or October, 1901, or at any other time, W. J. Tincker squatted or settled upon the Northwest quarter of said Section three (3) or upon the Southwest quarter of said Northwest quarter of said section; admits that in September and October, 1901, said quarter section was

unsurveyed; denies that said W. J. Tincker resided upon said quarter section, or any part thereof continuously or at all, or from September or October, 1901, down to August 1, 1906; denies that on or about August 1, 1906, or at any time, the said W. J. Tincker sold, conveyed or relinquished any right, title, claim or interest, in or to said Northwest quarter of Section three (3) or any part thereof, to Walter M. Smithey; denies that said Smithey immediately, or at all, went into possession of said Northwest quarter of said Section three (3) or any part thereof, or took up his residence thereon, then or at any time; denies that said Walter M. Smithey continued his residence or possession to November 24, 1906, or at all; denies that on or about November 24, 1906, or at any other time, the said Walter M. Smithey sold, conveyed or relinquished any right, title or interest in said Southwest quarter of the Northwest quarter of said Section three (3) or any portion thereof, or any improvements thereon, to the plain-
[fol. 25] tiff; denies that the plaintiff on November 24, 1906, or at any time prior to February 6, 1907, entered said Southwest quarter of Northwest quarter of said Section three (3) as a homestead, or otherwise; denies that he has at any time settled or resided thereon, or occupied or cultivated the same, and denies each and every allegation, matter and thing contained in Paragraph VI of the complaint, except as herein specifically admitted.

## VII

Answering Paragraph VII defendant admits that a plat of the survey of Township thirty-nine (39) N. R. 6 E. W. M. was filed in the Local Land Office at Seattle, Washington on February 6, 1907 admits that prior to the filing of said plat, and on May 5, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed its Selection List No. 43, describing a tract of land to be described when surveyed as the Southwest quarter of the Northwest quarter of Section three (3) Township Thirty-nine (39) N. R. 6 E. W. M.; admits that said selection list was filed and said land claimed under an act of Congress approved August 5, 1892, (27 Stat. 390) entitled "An Act for the Relief of Settlers on Certain Lands in the States of North Dakota and South Dakota"; admits that on June 21, 1902 the said St. Paul, Minneapolis & Manitoba Railway Company filed in the same office a re-arranged list, describing the same land; admits that accompanying said original list No. 43 and said re-arranged list was the affidavit of Mr. Thomas R. Benton, executed in Ramsey County, Minnesota, in which it was alleged that said lands "are vacant, unappropriated and are not *indicted* mineral nor reserved lands, and are of the character contemplated by said act;" admits that on February 23, 1907, and subsequent to the filing of the plat of the survey of said township, the said St. Paul, Minneapolis & Manitoba Railway Company filed a supplemental list, No. 43-A, accompanied by an [fol. 26] affidavit of said Thomas R. Benton to the same effect as that above quoted. It denies each and every allegation, matter and thing contained in said paragraph, and not herein specifically admitted.

## VIII

Answering Paragraph VIII it admits that on February 6, 1907 the plaintiff, Charles W. Reed, filed in the Land Office at Seattle, Washington, his application to enter the Southwest quarter of the Northwest quarter and Lot Four (4) and the West one-half of the Southwest quarter of said Section three (3) Township Thirty-nine (39) N. R. 6 E. W. M. as a homestead; denies that said Reed had no knowledge or notice then or until December 1, 1909, that said Southwest quarter of the Northwest quarter of said Section three (3) had been selected by the St. Paul, Minneapolis & Manitoba Railway Company as aforesaid, and affirmatively alleges that at the time of filing said application, and prior thereto, the plaintiff had both notice from the records of said Land Office and actual knowledge that said land had been so selected by the St. Paul, Minneapolis & Manitoba Railway Company on May 5, 1902, as aforesaid. Admits that on or subsequent to February 23, 1907, the Register and Receiver of the Seattle Land Office transmitted to the General Land Office at Washington, D. C., the said supplemental list No. 43-A filed February 23, 1907, with a certificate thereto, executed by them reciting in part "Nor is there any prior homestead or other valid claim to any portion of said lands on file or of record in this office." Admits that said selection list was approved, and that patent was thereafter issues to the Great Northern Railway Company. This defendant denies each and every allegation, matter and thing contained in said paragraph, and not herein specifically admitted.

[fol. 27]

## IX

Answering Paragraph IX defendant admits that on or about August 1, 1909, one John Carlson, having theretofore filed a homestead application upon the Southwest quarter of said Section three (3) and one H. W. Parrott, having theretofore filed contest affidavit, notices were issued by the said Seattle Land Office, citing the plaintiff and said Carlson and Parrott to appear before the Register and Receiver on December 1, 1909; admits that on said date the plaintiff appeared before the Register and Receiver; denies that it has any knowledge or information sufficient to form a belief as to what other appearances were then made; denies that plaintiff was then first informed that said Southwest quarter of the Northwest quarter had been selected by said St. Paul, Minneapolis & Manitoba Railway Company, but alleges on the contrary that he had been informed of that fact at and prior to the time of the filing of his homestead application. Admits that plaintiff was informed at said hearing that said Southwest quarter of the Northwest quarter of said Section three (3) had been patented to the Great Northern Railway Company; admits that said contests were decided adversely to the said John Carlson and H. W. Parrott; admits that on February 9, 1910, plaintiff filed a protest in the Seattle Land Office, praying that a hearing be had as to the Southwest quarter of the Northwest quarter of said Section three (3) and requesting that the patent to the Great

Northern Railway Company be cancelled as to said tract; admits that on January 16, 1914, after other hearings on said protest in the General Land Office, and before the Secretary of the Interior, said Secretary rendered a decision containing the language quoted in Paragraph IX of the complaint; admits that thereafter the plaintiff petitioned the United States Land Office to institute suit to have the [fol. 28] patent cancelled, which had theretofore been issued to the Railway Company, and that on April 18, 1916, the Assistant Secretary of the Interior rendered a decision in said matter, containing the language quoted in Paragraph IX of the Complaint. Defendant denies each and every allegation, matter and thing contained in said Paragraph IX and not herein specifically admitted.

X

Defendant denies each and every allegation, matter and thing contained in Paragraphs X and XI.

And for a further, separate and affirmative defense to the so-called cause of action set up in the complaint, and for a cross-complaint against the plaintiff, this defendant alleges:

I

That the original Selection list No. 43, filed by the St. Paul, Minneapolis & Manitoba Railway Company in the Local Land Office at Seattle on May 5, 1902, under the Act of Congress approved August 5, 1892 (27 Stat., Chapter 382, page 390) as alleged in the complaint was approved by the Secretary of the Interior on April 4, 1908, and the supplemental Selection List filed by said company on February 23, 1907, was approved by the Secretary of the Interior on April 4, 1908 and thereby said St. Paul, Minneapolis & Manitoba Railway Company became the owner of the lands embraced in said Selection Lists, including the said Southwest quarter of the Northwest quarter of said Section three (3); that by deed of general warranty, dated October 11, 1907, recorded in the office of the Auditor of Whatcom County on July 31, 1908, in Book 100 of Deeds at page 559, said St. Paul, Minneapolis & Manitoba Railway Company, for a valuable consideration, granted, bargained, sold and conveyed to this defendant, Great Northern Railway Company, all lands granted to it by the United States of America, including said Southwest quarter of the Northwest quarter of said Section three (3); and that [fol. 29] the purchase of said land by this defendant from said St. Paul, Minneapolis & Manitoba Railway Company was made innocently and in good faith, and for a valuable consideration, to-wit; the sum of thirty-five million dollars, and without knowledge or notice of any claim, right, title or interest, in or to said land, or any part thereof, by or on behalf of the plaintiff, or any grantor or predecessor in interest of the plaintiff, or of any person whomsoever, other than this defendant's grantor, and without knowledge or notice

of any fraud or mistake in the acquisition of the title to said land by said St. Paul, Minneapolis & Manitoba Railway Company, on its part, or on the part of any officer of the Land Department, or the Department of the Interior of the United States. That pursuant to the conveyance aforesaid, the United States of America delivered to this defendant its patent, dated April 13, 1908, to said Southwest quarter of the Northwest quarter of said Section three (3), conveying the same to this defendant in fee simple, and this defendant has ever since been, and now is, the owner thereof. That said patent was thereafter duly recorded on May 18, 1908, in Volume 3 of Patents, at page 64, records of Whatcom County, Washington.

II

That this defendant has been seized and possessed of said Southwest quarter of the Northwest quarter of said Section three (3) and the owner in fee simple thereof, for more than ten (10) years prior to the commencement of this action, and that neither the plaintiff, nor his predecessors in interest, or grantors, have been seized or possessed of said premises, or any part thereof, within ten (10) years before the commencement of this action, and that this action was not commenced within ten (10) years from the date when the plaintiff's [fol. 30] cause of action, if any, accrued.

III

That said Southwest quarter of the Northwest quarter of said Section three (3) is, and at all times has been vacant and unoccupied; that this defendant has paid all taxes, legally assessed thereon, for more than seven years last past, to-wit; from the year 1908 to the year 1919, successively and continuously, and that during all of said time this defendant has had title and color of title made in good faith to said lands, under and by virtue of its patent from the United States, aforesaid.

IV

That the filing of the original Selection List No. 43, of the St. Paul, Minneapolis & Manitoba Railway Company, embracing said Southwest quarter of the Northwest quarter of said Section three (3) in the Local Land Office at Seattle, on May 5, 1902, the filing of said supplemenal Selection List No. 43-A on February 23, 1907, and the issuance of patent to said land to this defendant on April 13, 1908, were all duly noted by the Register and Receiver of said Seattle Land Office upon the public books and records in said office, that on February 6, 1907, when the plaintiff filed application to enter said land as a homestead, the records in said office showed that said Southwest quarter of the Northwest quarter had been theretofore and on May 5, 1902, selected by said St. Paul, Minneapolis & Manitoba Railway Company, and this defendant is informed and believes and alleges the fact to be that said plaintiff at that time had both

notice and actual knowledge of the selection and claim of said lands by said St. Paul, Minneapolis & Manitoba Railway Company, under the act of Congress aforesaid, and that the plaintiff also knew of the filing of said Railway Company's Supplemental Selection List No. [fol. 31] 43-A and the issuance of patent to this defendant, but that notwithstanding such notice and knowledge, the plaintiff was guilty of laches and of inexcusable neglect and delay, in failing to commence any action (except the action mentioned in the succeeding paragraph) for the recovery of said lands, until the commencement of this suit; that thereby, and in reliance upon its patent from the United States, this defendant was induced to and did lay out large sums of money for taxes upon said property, and also was deprived of the opportunity to select other lands in lieu of said Southwest quarter of the Northwest quarter of said Section three (3); that had the plaintiff asserted his so-called cause of action promptly upon discovery of the facts upon which he now relies and had obtained the relief for which he now sues, it would have been possible for the defendant to have selected other lands of equal or greater value than those to which the plaintiff now lays claim, but that no such lands are now available for selection by the defendant.

V

That on the 8th day of October, 1915, the plaintiffs above named, commenced an action in the United States District Court for the Western District of Washington, Northern Division, against this defendant and the St. Paul, Minneapolis & Manitoba Railway Company, a true copy of the complaint in said action being hereunto annexed, marked Exhibit "A" and hereby made a part hereof; that in response to a subpœna, duly issued upon said complaint, this defendant appeared in said action and demurred to the complaint, upon the ground that the same did not state any matter of equity entitling the plaintiffs to any relief as against this defendant, and that on the 23rd day of November, 1915, an order was entered by said court sustaining said demurrer; that thereafter, by leave of court, paragraph IX of said complaint was amended by interlineation, so as to read as follows:

[fol. 32] "That said defendants claim some right, title, estate and interest in and to the foregoing described lands, more particularly to the S. W. ¼ N. W. ¼ of Section 3 thereof, *by reason of government patent No. 29 issued April 13, 1908 to the Great Northern Railway Company*, but that said claim is junior and inferior to the claim and right of these plaintiff."

(The amendment is underscored.)

and that this defendant demurred to said complaint, as so amended, upon the same grounds as those above stated, and on the 10th day of December, 1915, a second order was entered by said Court, sustaining this defendant's demurrer to the amended complaint, and

allowed plaintiffs thirty days within which to further plead; that said plaintiffs failed, neglected and refused to file any further pleading in said cause, and on the 14th day of May, 1917, upon motion of this defendant said action was dismissed, with judgment against the plaintiff for costs. That in said action all matters were or might have been litigated which are contained in the complaint in this cause, and by the Judgment of dismissal therein the so-called cause of action contained in the plaintiffs' complaint was fully and finally adjudicated.

Wherefore, this defendant prays that the complaint of the plaintiff be dismissed, and that this defendant have judgment that the plaintiffs and all persons claiming or to claim by, through or under them, be perpetually debarred and restrained from asserting any right, title or interest in the above described land, adverse to the defendants' title thereto.

F. V. Brown, Thomas Balmer, Attorneys for Defendant Great Northern Railway Company.

Jurat showing the foregoing was duly sworn to by Thomas Balmer omitted in printing.

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[fol. 33] EXHIBIT "A" TO ANSWER AND COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Equity. No. 74

CHARLES W. REED and DORA REED, His Wife, Plaintiffs,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, a Corporation, and Great Northern Railway Company, a Corporation, Defendants.

COMPLAINT

Comes now the plaintiffs in the foregoing entitled cause and for cause of action against the defendants and each of them allege as follows:

I

That said defendants each are a corporation, the first organized and existing under the laws of the State of Minnesota; the second organized and existing under the laws of the State of Minnesota.

II

That plaintiffs are a marital community and have been such during all times hereinafter mentioned.

III

That said plaintiffs, being qualified under the homestead laws of the United States, settled upon the following described tract of public land in good faith to make same their home under the homestead laws—under provisions of the Act of Congress dated May 14, 1880 (21 St. 140) and other kindred acts; Lot 4, S. W. ¼ N. W. ¼ and W ½ S. W. ¼ of Section 3, Township 39 North Range 6 East W. M. on November 24, 1906, and that said lands were at said time open to settlement under the land laws of the United States, and were vacant and unoccupied lands, and that at said time said plaintiffs duly posted their notices of claim of said lands under the homestead laws on the several subdivision corners about said claim and upon the [fol. 34] *trial* approaching said claim, and immediately proceeded to improve said land by cultivation and otherwise.

IV

That on February 6, 1907, said Charles W. Reed made homestead application under the land laws of the United States, Seattle Series 01417 for what is known as Lot 4 (or N. W. ¼ N. W. ¼) S. W. ¼ N. W. ¼ and W. ½ S. W. ¼, Section 3. Township 39 North Range 6 East W. M. Seattle, Washington Land District.

V

That on or about the summer of 1901 one W. J. Tincker, then and during all times hereinafter mentioned duly qualified as a homestead applicant under the laws of the United States, duly settled upon said lands hereinbefore described claiming same under said laws, and posted notices sufficiently advising the public of his claim of said land under the homestead laws of the United States, and that during the subsequent years 1902 and 1903, said notices of said Tincker were duly upon said land, and that said Tincker commenced the erection of his cabin about the 1st day of April, 1902, and retained claim upon said land and asserted rights thereto under his said notices and otherwise as such homestead claimant until August 21, 1906, at which time he sold and in writing conveyed his rights in and to said land to one W. M. Smithey, and that no notices of claim under the scrip land laws of the United States or otherwise were ever posted on said lands up to said time last mentioned.

VI

That for valuable consideration on or about November 24, 1906 said W. M. Smithey during all times herein mentioned qualified to take land under the homestead act of the United States sold, and in writing conveyed, his rights in and to said land and improvements to said plaintiffs herein, and that there were no notices under the scrip [fol. 35] laws of the United States at said time or otherwise in or near the vicinity of said land. That said land remained unsurveyed

in the field until the 25th day of July, 1905, and plat of survey of said land was not accepted by the Commissioner of the United States Land Office until the 27th day of November, 1906.

VII

That from said 24th day of November, 1906, until the present time said plaintiffs have constantly laid claim to said land under the homestead laws of the United States, and have consistently kept and improved the same, residing upon said land and occupying the whole thereof and during all times hereinbefore mentioned said plaintiffs are informed and state the fact to be that said lands were so occupied and so held and so improved all under claim of right under the homestead laws of the United States as to give notice to anyone coming into this vicinity of the occupancy of said lands. Furthermore, that all of said predecessors in interest and also these plaintiffs are and were duly qualified to take up homesteads under the land laws of the United States.

VIII

That plaintiffs herein have at all times for more than ten years last past in conjunction with their predecessors in interest claimed and asserted their lawful right to said land, as herein set forth, openly, notoriously and with adverse interest to the world at large, and have been during said time in peaceful occupation thereof.

IX

That said defendants claim some right, title, estate and interest in and to the foregoing described lands, more particularly to the S. W. ¼ N. W. ¼ of Section 3 thereof, but that said claim is junior and inferior to the claim and right of these plaintiffs.

Wherefore, Plaintiffs pray judgment and decree quieting title [fol. 36] against said defendants in and to said lands, and for such other, further and different relief as to this Honorable Court may seem meet.

Carl E. Croson and E. H. Flick, Attorneys for Plaintiffs.

Jurat showing the foregoing was duly sworn to by Chas. W. Reed omitted in printing.

We hereby acknowledge service of the foregoing Answer & Cross Complaint and the receipt of a true copy thereof, this 23 day of Oct. 1919.

Walter B. Whitcomb, Attorney for Plfs.

[File endorsement omitted.]

[fol. 37] IN THE SUPERIOR COURT *of the State* OF WHATCOM COUNTY

[Title omitted]

REPLY TO ANSWER AND CROSS COMPLAINT OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY—Filed June 23, 1920

Plaintiffs, for reply to Paragraph I of the defendant Great Northern Railway Company's separate and affirmative defense, allege that they have no knowledge, information or belief as to whether the original selection List No. 43 and the Supplemental Selection List in said paragraph mentioned were approved by the Secretary of the Interior on April 4, 1908, or at all, and therefore deny that they were approved, and allege that if the same were approved such approval was made without notice to plaintiffs or either of them and without their knowledge and in defraud of the rights of plaintiffs as alleged in the complaint herein, and that such approval if made was contrary to law, because the land described in the complaint and included in said Selection List was not vacant or unoccupied, but was in fact occupied and claimed by the plaintiff Charles W. Reed, and his privy in interest at and prior to the time when said Selection List and said Supplemental Selection List were made and filed, and plaintiffs further deny that the said St. Paul, Minneapolis & Manitoba Railway Company ever became the owner of the land in said paragraph and in the complaint herein mentioned.

[fol. 38] Further answering said Paragraph I, the plaintiffs admit that the said St. Paul, Minnesota & Manitoba Railway Company conveyed the land in the complaint mentioned to the defendant Great Northern Railway Company, but deny that the same was for a valuable consideration and allege that at the time of such conveyance that plaintiffs were in actual possession of said land, and further allege that the said defendant, Great Northern Railway Company had notice and knowledge of the claims, right and interest of the plaintiffs and each of them in and to the said land, and plaintiffs further deny that the defendant Great Northern Railway Company did not have knowledge or notice of the claim of plaintiffs in and to the said land and the plaintiffs also deny that the said defendant Great Northern Railway Company was without notice of the fraud of the said St. Paul, Minnesota & Manitoba Railway Company, as alleged in the complaint herein, whereby the legal title to said land was acquired by the said St. Paul, Minnesota & Manitoba Railway Company.

Further answering said Paragraph I, the plaintiffs deny each and every allegations, matter and thing therein contained, except as herein expressly admitted.

II

Answering Paragraph II of said defendants so-called Affirmative Defense and Cross-Complaint, plaintiffs deny the same and each and every allegation, matter and thing therein contained.

III

Answering Paragraph III of said defendants so-called Affirmative Defense and Cross-Complaint, plaintiffs deny the same and each and every allegation, matter and thing therein contained.

IV

[fol. 39] Answering Paragraph IV of said defendants so-called Affirmative Defense and Cross-Complaint, plaintiffs deny the same and each and every allegation, matter and thing therein contained.

V

Answering Paragraph V of the defendant Great Northern Railway Company's so-called Affirmative Defense and Cross-Complaint, the plaintiffs admit that they commenced an action in United States District Court, for the Western District of Washington, Northern Division, and that said action was dismissed, and deny each and every other allegation, matter and thing in said paragraph contained, and further answering said paragraph the plaintiffs allege that issue was not joined in said action; that the merits of said action were not submitted or tried by the said court, and allege that the order dismissing the said action expressly stated that the said action was dismissed without prejudice.

Further answering said paragraph, the plaintiffs allege that the same issues were not involved in that action as in this, and that the matters involved in this action could not be litigated in that action, and deny that the order of dismissal therein was an adjudication of the matters at issue in this action.

Wherefore, plaintiffs ask judgment as prayed for in their complaint herein.

Walter B. Whitcomb, J. W. Romaine, Attorneys for Plaintiffs.

Jurat showing the foregoing was duly sworn to by Charles W. Reed omitted in printing.

[fol. 40] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Jun. 12, 1922

The defendant, Great Northern Railway Company, requests the court to make the following findings and conclusions.

Findings of Fact

1. In the month of September or October, 1901, W. J. Tincker went upon the Northwest quarter of Section three (3) Township thirty-nine (39) N. R. 6 E. W. M., blazed a line around the same and posted notices on the four corners thereof that he claimed said quarter section of land as his homestead. He spent from two to three hours on the land at that time. He was not again on the land until some time between February and May, 1902. At that time he blazed a trail from the Nooksack River to the Northwest corner of said section three (3) and laid a few poles as the foundation for a cabin in the Northwest quarter (otherwise known as Lot four (4) of said Northwest quarter of said section three (3). From 1902 to 1906 Tincker was on the said Northwest quarter of Section three (3) an average of once or twice a year and renewed his notices. At all times mentioned in this finding Tincker was a married man, residing and living with his wife and family at Maple Falls, Washington, and keeping and maintaining a home there. He never completed the [fol. 41] cabin commenced in 1902, nor did any work on the land, other than as set forth in this finding, and neither he nor any member of his family ever setted or resided upon said land or cultivated the same in any manner.

2. On May 5, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed in the United States Land Office at Seattle, Washington, its Selection List No. 43, describing a tract of land to be described when surveyed as the Southwest Quarter of the Northwest Quarter of Section three (3) Township thirty-nine (39) N. R. 6 E. W. M. Said Selection List was filed and said land claimed as inuring to said Railway Company under an Act of Congress approved August 5, 1892 (27 Statutes, 390), entitled: "An Act for the Relief of Settlers on Certain Lands in the States of North Dakota and South Dakota." On June 21, 1902, said St. Paul, Minneapolis & Manitoba Railway Company filed in the same office a rearranged list, describing the same land. Said original List No. 43 and said rearranged list were accompaniel by the affidavit of Thomas R. Benton, the Land Agent of said St. Paul, Minneapolis & Manitoba Railway Company, stating in part that the lands therein described were vacant and unappropriated, and were not interdicted mineral nor reserved lands, and were of the character contemplated by the said act of Congress.

3. In August, 1906, said W. J. Tincker sold and relinquished his claim to the said Northwest quarter of said Section three (3) for twenty-five dollars ($25.00) to W. M. Smithy, who thereupon removed Tincker's notices and posted his own, claiming four forty-acre subdivisions in a row, described as the West half of the West half of said Section three (3).

4. Smithy blazed a trail from the north line of Section three (3) to a point on the Southwest quarter of the Northwest quarter of said section, where he cleared an area about one hundred (100) feet [fol. 42] square, and at that place sawed a cedar tree into sections for shakes to build a house, but the shakes were never split and the house was never built. Smithy was on the land five days, doing this work. He continued to claim the land from August to November, 1906, and spent one day a week on it during that interval swamping out trees and blazing out roads. During the time Smithy claimed the land he maintained a home and resided with his wife and family at Maple Falls, Washington, and neither Smithy nor his family ever went to live on the land. On November 24, 1906, Smithy sold and relinquished his claim to the plaintiff Charles W. Reed for fifty dollars ($50.00).

5. Upon purchasing the claim of Smithy the plaintiff removed Smithy's notices, and posted his own, claiming the said West one-half of the West one-half of said Section three (3) as a homestead. He immediately commenced clearing and the construction of a cabin on the Northwest quarter of the Northwest quarter of said Section three (3). About the first of March, 1907, his family moved into said cabin, and the plaintiff and his family have resided upon said Northwest quarter of the Northwest quarter of said Section three (3) continuously since that time. At that the time of the trial the plaintiff's improvements consisted of a house 10x20 feet in size, a wood shed, tool house, root house and barn, about an acre in cultivation and four adjoining acres slashed, all on said Northwest quarter of the Northwest quarter of said Section three (3). In addition the plaintiff has constructed a good trail, three-quarters of a mile north and south across his claim to the south quarter, and then a blazed trail across that. The sole improvements of the plaintiff on the Southwest quarter of the Northwest quarter of section three (3) up to the time of the trial consisted of said trail running across the same, and the planting of a place forty feet square with berries, in the space originally slashed by Smithey, as hereinbefore set forth. The berries mentioned were planted four or five years prior to the trial [fol. 43] and have not thrived on account of the shade.

6. The official plat of survey of said land was filed in the United States Land Office at Seattle on February 6, 1907. On said date the plaintiff filed in said United States Land Office his application to make homestead entry of Lot Four (4) the Southwest quarter of the Northwest quarter and the west half of the Southwest quarter (hereinbefore briefly described as the west half of the west half) of said Section three (3) alleging settlement on November 24, 1906. On

February 23, 1907, the St. Paul, Minneapolis & Manitoba Railway Company filed in said Land Office its Supplemental Selection List conforming its selection of the land therein described to the official survey. The original selection list of said Railway Company filed on May 5, 1902, and the supplemental selection list filed on February 23rd, 1907, were approved by the Secretary of the Interior on April 4, 1908, and on May 18, 1908, the patent of the United States was issued to the defendant, Great Northern Railway Company, grantee and successor of the St. Paul, Minneapolis & Manitoba Railway Company, for said Southwest quarter of the Northwest quarter of said Section three (3) in fee simple.

7. The plaintiff's homestead application was rejected by the United States Land Department as to the Southwest quarter of the Northwest quarter of said Section three (3), because of the selection of said tract by the St. Paul, Minneapolis & Manitoba Railway Company on May 5, 1902, and the patent of said tract to said Railway Company on April 23, 1908. Subsequently a petition filed by the plaintiff for the institution of a suit by the United States to vacate the Railway Company's patent was denied.

[fol. 44] 8. On October 8, 1915, the plaintiffs commenced an action in the United States District Court for the Western District of Washington, Northern Division, against the defendant, Great Northern Railway Company and the St. Paul, Minneapolis & Manitoba Railway Company, seeking the same relief as they claim in this action. That the defendant, Great Northern Railway Company, appeared in said action and demurred to the complaint, on the ground that it did not state any matter of equity entitling the plaintiffs to any relief as against said defendant, and on November 23, 1915, an order was entered by the court sustaining said demurrer. That thereafter, by leave of court, the plaintiffs amended their complaint in said action, so that the same presented the same issues as those presented in this action, and that said defendant demurred to said amended complaint upon the same grounds as those above stated, and on November 10, 1915, a second order was entered by said court, sustaining said defendant's demurrer to said amended complaint and allowing the plaintiffs thirty days within which to further plead. That the plaintiffs failed and refused to plead any further in said cause, and on May 14, 1917, said action was dismissed, with judgment against the plaintiffs for costs. That in said action all matters were or might have been litigated which may be litigated under the complaint in this cause.

9. That the defendant, Great Northern Railway Company, has been seized and possessed of said Southwest quarter of the Northwest quarter of said Section three (3) and the owner in fee simple thereof for more than ten years prior to the commencement of this action, and that neither the plaintiff nor his predecessors in interest or grantors have been sized or possessed of said premises or any part thereof within ten years before the commencement of this action,

and that this action was not commenced within ten years from the [fol. 45] date when the plaintiff's cause of action, if any, accrued.

10. That the said Southwest quarter of the Northwest quarter of said Section three (3) is, and at all times has been vacant and unoccupied, and that the defendant has paid all taxes legally assessed thereon for more than seven years prior to the commencement of this action, to-wit: from the year 1908 to the year 1919, successively and continuously, and that during all of said time said defendant has had title and color of title made in good faith to said lands, under and by virtue of its patent from the United States aforesaid. That the plaintiffs have never paid any taxes on said land, and have never had color of title thereto.

11. For at least nine years prior to the commencement of the action the plaintiffs knew that the land now claimed by them had been patented to the defendant, Great Northern Railway Company, but failed to commence any action to enforce their claim of title to said land, (except the action mentioned in the preceding findings), until the commencement of this suit. That thereby and in reliance upon its patent from the United States, the defendant was induced to and did lay out large sums of money for taxes upon said property, and also was deprived of its opportunity to select other lands in lieu of the said Southwest quarter of the Northwest quarter of said Section three (3). That had the plaintiffs asserted their claim promptly upon discovery of the facts set forth in the complaint, it would have been possible for the defendant railway company to have selected other lands of equal value to those involved herein, had the said lands been lost at the plaintiffs' suit, but that no such lands remained available for selection by the defendant [fol. 46] at the time of the commencement of this action.

Pursuant to the foregoing Findings of Fact, the Court makes the following

Conclusions of law

1. No adverse right or claim had been attached or been initiated to said Southwest Quarter of the Northwest Quarter of said Section Three (3), Township thirty-nine (39) Range Six (6) E. W. M. at the time of the making of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company on May 5th, 1902, but said land was then vacant and unappropriated public land of the United States and not interdicted mineral or reserved land, and was of the character contemplated by and subject to selection under the Act of Congress approved August 5, 1892, entitled "An Act for the Relief of Settlers upon Certain Lands in the States of North Dakota and South Dakota."

2. The acts of Tincker did not initiate any right or claim which exmpted the land from selection by the Railway Company under the said Act of Congress, approved August 5th, 1892, and no settlement upon the said land was ever made by Tincker under the homestead laws of the United States.

3. The affidavit of the Railway Company's Land Agent, attached to the Selection List filed May 5, 1902, stating that said land was vacant and unoccupied and was subject to selection under the act of August 5, 1892, was neither a mistake nor a fraud, but was a correct statement of the true facts.

4. That the action of the plaintiffs against the defendant is barred for failure to commence the same within ten (10) years from the date when said cause of action accrued.

5. That the plaintiffs have been guilty of laches and of inexcusable neglect and delay, barring the prosecution of this action.

[fol. 47] 6. That in the action commenced by the plaintiffs against defendants in the United States District Court for the Western District of Washington, Northern Division, on October 8, 1915, and dismissed on May 14, 1917, all matters were or might have been litigated which may be litigated under the complaint in this cause, and that by the orders sustaining demurrers and the judgment of dismissal in said action the cause of action contained in the complaint herein was fully and finally adjudicated against the claim of the plaintiffs.

7. That by reason of the payment by the defendant of all taxes legally assessed on said Southwest Quarter of the Northwest Quarter of said Section Three (3) for more than seven successive years, under claim of right and color of title, while the said land was vacant and unoccupied, and the non-payment by the plaintiffs of any taxes on said land at any time, the defendant, Great Northern Railway Company, is entitled to be deemed and adjudged to be the legal owner of said land, to the extent and according to the purport of its patent from the United States of America.

8. That the defendant, Great Northern Railway Company, is entitled to judgment that the plaintiffs and all persons claiming or to claim by, through or under them be perpetually debarred and restrained from asserting any right, title or interest in said Southwest Quarter of the Northwest Quarter of Section Three (3) Township thirty-nine (39) N. R. 6 E. W. M., adverse to the defendant's title thereto.

Done in open Court this — day of —— 1922.

—— ——, Judge.

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[fol. 48] IN SUPERIOR COURT OF WHATCOM COUNTY

ORDER REFUSING DEFENDANT'S REQUESTED FINDINGS AND CONCLUSIONS

The foregoing findings of facts and conclusions of law were presented to the court by counsel for defendant and each read and considered by the Court before the making, signing and filing of findings of facts and conclusions of law herein by the Court and each of

said proposed findings of facts and conclusions of law is now refused and denied by this Court.

Ed E. Hardin, Judge.

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[fol. 49] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

DEFENDANT'S EXCEPTIONS TO THE REFUSAL OF THE COURT TO MAKE FINDINGS OF FACT AND CONCLUSIONS AS PROPOSED BY DEFENDANT—Filed Jun. 14, 1922

1. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 1.

2. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 2.

3. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 3.

4. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 4.

5. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 5.

6. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 6.

7. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 7.

8. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 8.

9. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 9.

10. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 10.

[fol. 50] 11. Defendant excepts to the refusal of the court to make and enter its proposed Finding of Fact No. 11.

1. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 1.

2. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 2.

3. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 3.

4. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 4.

5. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 5.

6. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 6.

7. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 7.

8. Defendant excepts to the refusal of the court to make and enter its proposed Conclusion of Law No. 8.

Dated this 13th day of June, 1922.
Thomas Balmer, Edwin V. Matthias, Attorneys for Defendant.

We hereby acknowledge service of the foregoing exceptions and the receipt of a true copy thereof this — day of June, 1922.
Walter B. Whitcomb, by G. V., Attorneys for Plaintiffs.

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[fol. 51] In the Superior Court, County of Whatcom

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Jun. 21, 1922

The above entitled action came regularly on for trial before the above named court at the Court house in the City of Bellingham, said County and State, on the 23 day of June, 1921. Walter B. Whitcomb, Esq. and F. M. Hamilton, Esq. appeared as attorneys for Plaintiff. Thomas R. Balmer, Esq., appeared as attorneys for Defendants. Testimony was heard and the cause submitted and arguments and briefs of counsel having been heard and considered, and the Court having duly considered the same does now make the following:

## Findings of Fact

### I

That the plaintiffs, Charles W. Reed and Dora Reed, now are and at all times hereinafter mentioned have been husband and wife.

### II

That the defendant, St. Paul, Minneapolis and Manitoba Railway Company, now is and at all times hereinafter mentioned has been a corporation, organized, created and existing under the laws of the State of Minnesota, and that said defendant has answered herein, [fol. 52] disclaiming any interest in this action or in the real estate, the subject of the action.

III

That the defendant, Great Northern Railroad Company, now is and at all times mentioned, in the complaint has been a corporation, organized, created and existing under the laws of the State of Minnesota.

IV

That the defendant, Walker D. Hines, as Director General of Railroads, has answered herein disclaiming any claim, right or interest in any of the matters in question in this action and asking that the action be dismissed as to him, for that reason.

V

That the plaintiff, Charles W. Reed, was born in the State of Illinois, February 15, 1860; that he now is and at all times hereinafter mentioned has been a citizen of the United States over twenty-one (21) years of age, and was not, at the time he settled upon the land hereinafter mentioned, nor at the time he filed thereon in the United States Land Office, at Seattle, Washington, nor at any time since, nor is he now, the owner of any real estate other than that herein described, and was in all respects qualified to make entry upon unappropriated public lands of the United States subject to entry as a homestead.

VI

That on the 1st day of September, 1901, and at all times thereafter, W. J. Tincker was a citizen of the United States over the age of twenty-one (21) years, not the owner of other real estate, and was duly qualified to settle upon, enter and patent unappropriated lands of the United States, under the Homestead Laws of the United States.

[fol. 53]

VII

That in the month of September or October, 1901, the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section Three (3) Township thirty-nine (39) north of Range six (6) East of the Willamette Meridian, Whatcom County, State of Washington, was unappropriated public lands of the United States, subject to settlement, entry and patent under the Homestead Laws of the United States; that in the month of September or October, 1901, the said W. J. Tincker squatted and settled upon the Northwest quarter (N. W. ¼) of Section three (3) Township thirty-nine (39) North of Range Six (6) East of Willamette Meridian including the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of the said Section three (3) which said land was at that time unsurveyed; that he settled and squatted upon the said land with the purpose and intention of holding the same as a homestead under the Laws of the United States, and of filing and perfecting his title thereto under the said laws; that in pursuance

of said intention and in compliance with the laws of the United States in such case made and provided; he posted notices of his rights and claims to the said land upon the same. That between the first day of February, 1902, and the first day of April, 1902, the said W. J. Tincker continued his settlement of said land and went thereon and blazed some trails and cut poles and laid the foundation for a cabin upon said land.

VIII

That on the 18th day of December, 1902, the said land with other land, was by order of the Department of the Interior "withdrawn from settlement, entry, sale, or other disposal pending determination as to the advisability of including such lands within the Washington Forest reserve," and by order of September 20th 1904, the land was released from said temporary withdrawal "and restored to settlement, but provided that the land so released from [fol. 54] withdrawal and restored to settlement shall not be subject to entry, filing or selection under the public lands until after ninety (90) days notice by such publication as the Land Office may prescribe." And that it was not so thrown open until February 6th, 1907; that thereafter and up to August, 1906, when he transferred his rights to Smithy, Tincker continued to claim the land as his homestead, under his right thereto by settlement and went upon the land at least once each year and renewed and kept continuously posted his notices of settlement and claim to the land as homesteader. During said time said Tincker was a married man and maintained a home at the village of Maple Falls, near by, where he, with his wife and children lived.

IX

That on or about August 1st, 1906, the said W. J. Tincker sold, conveyed and relinquished all his right, title, claim and interest in and to the said Northwest quarter (N. W. ¼) of said Section three (3) to Walter M. Smithy; that the said Walter M. Smithy then and there was a citizen of the United States over the age of tweny-one (21) years and a duly, qualified homesteader under the laws of the United States; and the said Walter M. Smithy immediately went into possession of the Northwest quarter (N. W. ¼) of Section Three (3). That the said Smithy immediately tore down the said notices of Tincker and replaced the same with notices that he, himself, claimed the said land as a homestead; that he cleared a piece of ground upon the Southwest quarter (S. W. ¼) of the said Northwest quarter (N. W. ¼) of Section Three (3), the land here in question, cut some timber, cut cedar to make shakes, slashed and blazed some trails and prepared to build a house upon said land.

[fol. 55]

X

That on or about the 24th day of November, 1906, the said Walter M. Smithy sold, conveyed and relinquished all his rights, title, claim and interest in and to the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) and the Northwest quarter (N. W. ¼) of the Northwest Quarter (N. W. ¼) also known as Lot Four of said Section three (3) and all improvements therein to the plaintiff, Charles W. Reed, who immediately thereupon, entered, settled and squatted upon the Southwest quarter (S. W. ¼) of the Northwest Quarter (N. W. ¼) and the said Lot Four (4) and the West Half (W. ½) of the Southwest quarter (S. W. ¼) of said Section three (3), with the purpose and intention of becoming a homesteader, thereby claiming the same as a homestead, under the Laws of the United States, and of filing upon and entering the same as such and of perfecting his title thereto; that he has continuously occupied the said land since said time and has resided thereon with his family continuously since about March 1st, 1907; that in the month of November, 1906 the said plaintiff, Charles W. Reed, began the construction of a house upon the said Lot four (4) (Northwest quarter of the Northwest quarter) which was contiguous to the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3), and a part of the land claimed by plaintiff as a homestead, and shortly thereafter completed the same and ever since said time has occupied, cultivated and made his home upon the land so claimed by him as a homestead, including the land here in question, with the purpose and intention of claiming all of the same as a homestead under the laws of the United States, and he has never relinquished forfeited or surrendered his rights thereto. That in November, 1906, said Reed removed the notices posted on said land by said Smithy and replaced the same with notices of his own to the effect that he claimed the said land as a homestead and [fol. 56] has kept said notices continuously posted.

XI

That a plat of Survey of Township thirty-nine (39) North Range six east (6 E.) Willamette Meridian, of the land District of Seattle, Washington, was filed in the local land office on February 6, 1907; that prior to the filing of the said Plat, and on May 5, 1902, and at the time when the said W. J. Tincker was in the possession and occupancy of the said land, and claiming to hold the same as a bona fide settler and homesteader, the said defendant, St. Paul, Minneapolis & Manitoba Railway Company filed its List 43 (now Serial 024450) describing a tract of land which it claimed would be described when surveyed as the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3) in said Township and Range, under an Act of Congress of August 5, 1892, 27 Statutes, 390, entitled: "An Act for Relief of Settlers on Certain Lands in the States of North and South Dakota," and on June 21, 1902, the said St. Paul, Minneapolis & Manitoba Railway Company

filed in said land office a Rearranged List describing the same land; that accompanying the said original list No. 43 and the re-arranged list above mentioned was the affidavit of Mr. Thomas R. Benton in support thereof, executed in Ramsey County, Minnesota, on March 22, 1902, in which it is alleged that the said lands "are vacant, unappropriated and are not indicated mineral nor reserve lands, and of character contemplated by said Act;" that the said affidavit was untrue and false at the time when the same was made and at the time when the said list was filed, and at all times thereafter in the following particular, to-wit: that the said land was not vacant and was not unappropriated at said times but was, in fact, occupied and possessed by the plaintiffs' grantor, W. J. Tincker, and had been appropriated by him for the purposes hereinabove mentioned; that [fol. 57] thereafter, on February 23, 1907, subsequent to the filing of the Plat of Survey hereinabove mentioned, the said St. Paul, Minneapolis & Manitoba Railway Company filed a Supplemental List 43-A, accompanied by another affidavit of Mr. Benton, to the same effect, and alleging therein that at that time, to-wit: February 23, 1907, the said lands were still vacant and unappropriated; and that this affidavit also was false and untrue in that the said lands were not vacant and unappropriated but were at that time actually occupied, and in the possession of, claimed and appropriated by this plaintiff, Charles W. Reed, as hereinabove mentioned.

## XII

That on February 6th, 1907, the plaintiff, Charles W. Reed filed in the Land Office at Seattle, Washington, his application to enter the said Southwest quarter (S. W. ¼) of the Northwest Quarter (N. W. ¼) and the said Lot four (4) and the West Half (W. ½) of the Southwest quarter (S. W. ¼) of said Section three (3) as and for a homestead, which said application was received by the Register and Receiver of the said Seattle Land Office, without objection, and the said plaintiff was not informed by the said Register or Receiver, nor by anyone else, that the said land had been selected by the said St. Paul, Minneapolis & Manitoba Railway Company, nor had he any knowledge or notice thereof at that time, nor at any time thereafter until December 1st, 1909.

That on or about March 11, 1907, the Register and Receiver of the Seattle Land Office transmitted to the General Land Office at Washington, D. C. the said supplemental list filed February 23, 1907, with a certificate thereto, executed by the said Register and Receiver reciting: "Nor is there any prior homestead or other valid claim to any portion of said lands on file or of record in this office;" that the said certificate did not show the filing of claim of plaintiff; [fol. 58] that if it was intended as a certificate that there were no other claims to the said land it was false and fraudulent as to this plaintiff, for the reason that the form of certificate in such case required by the General Land Office called for a certificate as to whether there were any homestead or other valid claims to any portion of said lands on file or of record at that time in the District Land Office, and

the Register and Receiver of the Seattle Land Office inserted in ink in said certificate the word "prior," thus altering the character of the certificate required from Registers and Receivers, and in effect adjudicating the question as between plaintiff and the said Railway Company as to which had a prior right; and without notice to plaintiff and without giving him any right or opportunity to be heard thereon, while, as a matter of fact, at that time the plaintiff's homestead application was then on file in the Seattle Land Office, and he was claiming the said land as the successor in interest to the said W. J. Tincker and Walter M. Smithy; that the plaintiff, Charles W. Reed, was not notified by the Land Office or by any other person, nor had he any notice that his claim to the said land had been adjudged to be junior to the said St. Paul, Minneapolis & Manitoba Railway Company's selection list, and he was thus deprived of the right and opportunity to present his claim of priority, and the evidence of his settlement and improvements, and of the settlement and improvements of his grantors, and of the right to present to the Land Office his petition and evidence to have the claim, application and patent of the said St. Paul, Minneapolis & Manitoba Railway Company cancelled and set aside and adjudged to be junior to the claim of this plaintiff; that the action of said Register and Receiver of the Land Office, in certifying the said list of the defendant St. Paul, Minneapolis & Manitoba Railway Company to the General [fol. 59] Land Office, without mentioning the application and claim of the plaintiff, Reed, thereto, was, in effect, a fraud upon plaintiff and his rights; that said St. Paul, Minneapolis & Manitoba Railway Company's selection list, which became Approved List No. 33, and Patent No. 29, dated April 13, 1908, and recorded at Page 189 of Volume 37 of Patents, was issued to the said defendant thereafter and the said patent was issued without notice before its issuance to the plaintiff, Charles W. Reed, and without knowledge or notice of any kind on his part of the said defendant's application therefor, and plaintiff was not notified of the issuance thereof, nor was he given any notice whatsoever, that the claim of the said defendant had been adjudged to be prior and superior to his own, and same was issued by mistake for the reason that the General Land Office and the Department of the Interior had no knowledge or notice of the rights, application or claim of the plaintiff to the said land, and because of the untrue and misleading affidavit of the said Thomas R. Benton, and of the said Certificate of the Register and Receiver of the Seattle Land Office and the sole proof received by the General Land Office upon the application of the said St. Paul, Minneapolis & Manitoba Railway Company to patent the said land, that the same was vacant and unappropriated was the affidavit of the said Thomas R. Benton.

## XIII

That on or about October 1, 1909, one John Carlson having theretofore filed homestead application upon the said Southwest quarter (S. W. ¼) and one Henry W. Parrott, having theretofore filed contest affidavit against the entries of the said Carlson and this plain-

tiff, Reed, notices were issued by the said Seattle Land Office citing the plaintiff and said Carlson and said Parrott to appear for hearing before the Register and Receiver of said Seattle Land Office on December 1, 1909; that on December 1, 1909, this plaintiff, Charles [fol. 60] W. Reed, appeared before the Register and Receiver of the Land Office at Seattle, Washington, and the said Henry W. Parrott appeared by attorney, and the said John Carlson made default, and when the said matter, on said day, came on for hearing, the plaintiff was informed by the Register of the said Land Office that the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3) had been selected by the said defendant, St. Paul, Minneapolis & Manitoba Railway Company, and that it had been patented to the said defendant, and that the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section three (3) would not be included in plaintiff's homestead entry because of that fact, and when the plaintiff asked that the said defendant be brought in, he was informed by the Register of the Land Office that it could not and would not be brought in because the patent had already been issued. And that the said plaintiff, Charles W. Reed, then and there made due and formal proof of his residence and improvements upon said land, and his statements in regard thereto were in all things corroborated by four other witnesses.

That shortly after learning that the said land had been patented to the said defendant, and on February 9, 1910, the plaintiff, Charles W. Reed, lodged a protest with the United States Land Office against the patenting of the said Southwest Quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3) said Township and Range, to the said defendant, St. Paul, Minneapolis & Manitoba Railway Company, and asked for a hearing between himself and the Company with respect thereto, and for cancellation of the said defendant's patent, and that such proceedings were had in the said matter that it finally came before the Secretary of the Interior, who, on January 16, 1914, rendered a decision therein in which he said:

[fol. 61] "I am of the opinion that there was no such error in the issuance of patent to the Railway Company as would justify this Department in requesting the Attorney General to Institute suit for the cancellation of the patent. Had Reed presented all the facts with the respect to his settlement claim at the date of the tender of his homestead application undoubtedly patent could not properly have issued to the Railway Company without affording him an opportunity to be heard. He is now before the Department asking its intervention against the consequences of his own laches,"

that the decision is contrary to law, is unfair and unjust to the plaintiffs, and that the said decision was rendered in mistake, both of fact and of law, in the following particulars, to-wit: (1) That the attempted selection by the Defendant Railway Company of the said land and the issuance of patent therefor were based upon the false affidavit of Thomas R. Benton and that the said land was not subject to selection by the said Railway Company, for the reason that it was

at the time of the attempted selection segregated from public domain by settlement thereon by W. J. Tincker who transferred his rights therein to Smithy, who in turn conveyed his rights therein to the plaintiff Reed, each of whom, bona fide, claimed the same as a settler and a homesteader, and were continuously in the possession of said land since prior to the attempted selection by the Railway Company to the time of the commencement of this action. (2) That the plaintiff, Charles W. Reed, was not notified of any adjudication by the Seattle Land Office, or by the General Land Office that the claim of the defendant St. Paul, Minneapolis & Manitoba Railway Company was prior to plaintiff's said claim, nor was he notified or had any knowledge that the said land had been patented to the said defendant Railway Company until October, 1909, when he was in the Seattle Land Office for the purpose of making his final proof upon said land with his witnesses all there present, when he was refused opportunity to present any evidence in regard to his claim to said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼), or the settlement or claim of his grantors, and was refused permission to contest the claim of the said Railway Company.
[fol. 62] That by reason of these facts the Secretary of the Interior was mistaken both in law and in fact in his conclusion that the said Charles W. Reed had been guilty of any laches in asking to have the patent of the said Railway Company cancelled; and by reason of said decision the plaintiff Reed was wrongfully denied the title to the said land.

That thereafter the said plaintiff, Charles W. Reed, again petitioned the United States Land Office to institute suit to have the patent theretofore issued to the said St. Paul, Minneapolis & Manitoba Railway Company cancelled, and such proceedings were had that on the 18th day of April, 1916, the Assistant Secretary of the Interior rendered decision in said matter in which it is said:

"The above land was selected May 5, 1902, while still unsurveyed, by the Railway Company, under the act of August 5, 1892, (27 Stat., 390), upon February 6, 1907, Reed filed his homestead application for this tract, together with certain other adjoining subdivisions, asserting that he had settled thereon November 24, 1906. The present petition asserts that the Register and Receiver failed to transmit his homestead application to the General Land Office until April 30, 1908, and that the issuance of patent while his application was pending was erroneous.

Reed's allegations of settlement at the time of presenting his application placed, the time thereof as subsequent to the filing of the Railway Company's selection. At the time of the issuance of patent therefor, in so far as the facts were disclosed by Reed, such issuance was correct. Upon June 19, 1911, however Reed filed affidavits to the effect that one Tincker had settled upon the land in 1901, prior to the Railway Company's selection. This showing, however, was not made until after the patent had been issued to the Railway Company.

In its decision of January 16, 1914, the Department stated as follows:

'I am of the opinion that there was no such error in the issuance of patent to the Railway Company as would justify this Department in requesting the Attorney General to institute suit for the cancellation of the patent. Had Reed presented all the facts with reference to his settlement claim at the date of the tender of his homestead application, undoubtedly patent could not properly have issued to the Railway Company without affording him an opportunity to be heard. He is now before the Department asking its intervention against the consequence of his own laches.

If, under the facts alleged in the pending petition, Reed has a superior right to the land under consideration, his remedy would appear to lie in an action in the courts against the Railway Company.' "

[fol. 63] That the assistant Secretary of the Interior was mistaken in law and in fact for all of the reasons above stated as to the decision of January 16, 1914, and for the further reason that when the plaintiff, Reed, offered his final proof upon his application for patent of said land, he was informed by the Register and Receiver of the Seattle Land Office that his application for patent of the said Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said section three (3) could not be considered and would not be considered; that the land had already been patented to the defendant, St. Paul, Minneapolis & Manitoba Railway Company, and that his proof could not be accepted as to that tract at that time; and when he demanded that the said defendant Railway Company be brought in and that his proof be taken; he was informed that the land having already been patented to the defendant, the land office had no right or authority to bring in the said defendant Railway Company, and the plaintiff was not given an opportunity to make his proofs as to his settlement upon the said lands; and for these reasons the decision of the said Land Office and of the Secretary of the Interior was contrary to law and contrary to fact, and he has been deprived of the right or opportunity to present his proofs or his application for the patent of the said land.

## XIV

That the plaintiff, Charles W. Reed, with his wife, Dora Reed, and his family, have, since the 24th day of November, 1906, remained in the possession, of the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) and the said Lot Four (4), and the West Half (S. ½) of the Southwest quarter (S. W. ¼) of said Section three (3), Township thirty-nine (39) North of Range Six (6); have each year farmed the same; have continued in the occupancy thereof; have built a house thereon ten by twenty feet (10 x 20') with an addition twelve by sixteen feet (12 x 16') a wood shed, tool house, root house and a barn twelve by sixteen feet (12 x 16') that [fol. 64] he has cleared about one and one-half (1½) acres of said

land, and has four (4) acres of said land slashed, and that he has built six (6) miles of trail on and in connection with his said location and residence on said land and his improvements thereon; that he has each year since 1906 raised a crop upon said land, has planted fruit trees thereon, that are now bearing, and that he has at all times maintained his residence upon said land and made it his home.

XV

That at all times since October 1901 the plaintiff and his grantors have been in continuous, open, exclusive, notorious and hostile possession of the said Southest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of said Section Three (3), Township thirty-nine (39) North of Range six (6) East, W. M., Whatcom County, Washington, under claim of right thereto.

XVI

That said defendant, St. Paul, Minneapolis & Manitoba Railway Company has heretofore conveyed any interest it might have had in the said land to the defendant, Great Northern Railroad Company, and the said St. Paul, Minneapolis & Manitoba Railway Company disclaims any interest in the said land.

XVII

That the defendant, Great Northern Railroad Company has paid taxes upon the land in question, as follows:

1909—$20.65; 1910—15.25; 1911—$17.73; 1912—$38.16; 1913—$45.95; 1914—$42.81; 1915—$30.78; 1916—$38.85; 1917—$45.11; 1918—$20.84; 1919—$24.43.

Dated this 15th day of June, 1922.

Ed. E. Hardin, Judge.

[fol. 65] Conclusions of Law

The Court having duly made and consider- the foregoing Findings of Fact, does now make therefrom the following

Conclusions of Law

I

That the plaintiffs, Charles W. Reed and Dora Reed, his wife, are entitled to the judgment and decree of this court; that they are the owners of the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3) Township thirty-nine (39) North Range six (6) East of Willamette Meridian, Whatcom County, State of Washington, by right of settlement there on and by adverse possession thereof; and that their title thereto, be quieted;

and that the defendants have not, nor has either of them, any right, title, claim or interest in or to the said real estate.

II

That the plaintiffs are entitled to the further judgment and decree of this Court; that the defendant, Great Northern Railroad Company holds the legal title to the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of section three (3) Township thirty-nine (39) North, Range six (6) East of Willamette Meridian, Whatcom County, State of Washington, in trust for the plaintiffs, Charles W. Reed and his wife, Dora Reed, as community of husband and wife; and that said defendant be directed and required to convey the said land to the plaintiffs, and upon their failure so to do, a commissioner be appointed by this Court to make such conveyance.

III

The defendant, St. Paul, Minneapolis & Manitoba Railway Company and Walker D. Hines as Director General of Railroads having disclaimed any interest in the land, the title to which is in controversy herein, judgment be entered, dismissing this action, as to each of them.

[fol. 66]

IV

That the defendant, Great Northern Railroad Company is entitled to judgment against the plaintiffs, Charles W. Reed, and Dora Reed, his wife, on account of taxes paid upon the land in question as follows:

$20.65 at 6% per annum from May 31, 1909.
$15.25 at 6% per annum from May 31, 1910.
$17.73 at 6% per annum from May 31, 1911.
$38.16 at 6% per annum from May 31, 1912.
$45.95 at 6% per annum from May 31, 1913.
$42.81 at 6% per annum from May 31, 1914.
$30.78 at 6% per annum from May 31, 1915.
$38.85 at 6% per annum from May 31, 1916.
$45.11 at 6% per annum from May 31, 1917.
$20.84 at 6% per annum from May 31, 1918.
$24.43 at 6% per annum from May 31, 1919.

and that the said sums less the plaintiffs' costs herein be declared lien upon the land in question and that if the same be not paid within ninety (90) days after the entering of final judgment therein or within ninety (90) days after the coming down of the remittitur if this case be appealed, then the said defendant may sell the said land to pay the said taxes with interest, less the plaintiffs' costs herein applied as a credit as of the date hereof.

That plaintiffs have judgment against the defendant Great Northern Railroad Company for their costs and disbursements in this action expended.

Dated this 15th day of June, 1922.

Ed E. Hardin, Judge.

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[fol. 67] IN THE SUPERIOR COURT, COUNTY OF WHATCOM

[Title omitted]

JUDGMENT AND DECREE—Filed June 21, 1922

The above-entitled action having come regularly on for trial, before the above-entitled Court at the Court-house in the City of Bellingham, said County and State, on the 23d day of June, 1921; Walter B. Whitcomb, Esq., and F. M. Hamilton, Esq., appearing as attorneys for plaintiffs and Thomas R. Balmer, Esq., appearing as attorney for defendants, and each of the defendants having appeared at action and answered the complaint, and the court having heard the testimony of witnesses and the cause having been argued and submitted and the Court having made Findings of Fact and Conclusions of law.

It is now considered, ordered, adjudged and decreed:

I. That the plaintiffs, Charles W. Reed and Dora Reed, his wife, are the owners of the Southwest quarter (S. W. ¼) of the Northwest quarter (N. W. ¼) of Section three (3), Township Thirty-nine (39) North of Range Six (6) East of the Willamette Meridian, Whatcom County, State of Washington; and that their title thereto be quieted and that the defendants have not, nor has either of them any right, title, claim or interest in or to the said real estate, except as hereinafter expressly provided.

[fol. 68] II

That the defendant Great Northern Railroad Company holds the legal title to the said Southwest quarter (S. W. ¼) and the Northwest quarter (N. W. ¼) of Section Three (3), Township thirty-nine (39) North of Range Six (6) East of the Willamette, Meridian, Whatcom County, State of Washington, in trust for the plaintiffs, Charles W. Reed and Dora Reed, his wife, as community of husband and wife, and the said defendant is hereby directed and required to convey the said land to the plaintiffs, and that upon its failure so to do within — days from the date hereof, that a commissioner be appointed by this court to make such conveyance.

III

That the defendant Great Northern Railroad Company have and recover of and from plaintiffs, Charles W. Reed and Dora Reed, his

Wife, the sum of Four hundred ninety-seven & 92/100 dollars ($497.92) taxes heretofore paid by the said defendant upon the land above described with interest, less plaintiffs' costs herein; that the said sum be paid within ninety days from the entry of final judgment herein or if this case be appealed to any higher court then within ninety days from the coming down of the remittitur, that said sum is declared to be and is a lien upon the real estate above described and if the said sum is not paid within the time provided in this judgment then the said real estate may be sold to pay the said sum with interest.

IV

That the defendants, St. Paul, Minneapolis & Manitoba Railway Company, and Walker D. Hines, as Director General of Railroads having dismissed any interest in the land, the title to which is in controversy herein, this action be and it hereby is dismissed as to each of them.

[fol. 69]

V

That the plaintiffs have and recover of and from the defendants Great Northern Railroad Company the costs and disbursements of the plaintiffs herein to be taxed.

Dated this 21st day of June, 1922.

Ed. E. Hardin, Judge.

[File endorsement omitted.]

(Recorded in Journal B-15 at page 320.)
(Entered in Execution Docket "L" at page 297.)

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[fol. 70] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR WHATCOM COUNTY

[Title omitted]

DEFENDANT'S EXCEPTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE—Filed June 26, 1922

The defendant, Great Northern Railway Company, excepts to the findings of fact and conclusions of law, dated June 15, 1922, and to the decree dated June 21st, 1922, all of which were entered and filed on June 21st, 1922, as follows:

1. Defendant excepts to Finding of Fact No. 5, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

2. Defendant excepts to Finding of Fact No. 6, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

3. Defendant excepts to Finding of Fact No. 7, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

4. Defendant excepts to Finding of Fact No. 8, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

5. Defendant excepts to Finding of Fact No. 9, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

[fol. 71] 6. Defendant excepts to Finding of Fact No. 10, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

7. Defendant excepts to Finding of Fact No. 11, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

8. Defendant excepts to Finding of Fact No. 12, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

9. Defendant excepts to Finding of Fact No. 13, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

10. Defendant excepts to Finding of Fact No. 14, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

11. Defendant excepts to Finding of Fact No. 15, and to each and every part thereof, upon the ground that the same is not supported by the evidence, but is contrary thereto.

1. Defendant excepts to Conclusion of Law No. 1, and to each and every part thereof, upon the ground that the same is contrary to the evidence and contrary to law.

2. Defendant excepts to Conclusion of Law No. 2, and to each and every part thereof, upon the ground that the same is contrary to the evidence and contrary to law.

3. Defendant excepts to conclusion of Law No. 5, and to each and every part thereof, upon the ground that the same is contrary to the evidence and contrary to law.

[fol. 72] Defendant excepts to the judgment and decree and to each and every part thereof, upon the ground that the same is contrary to the evidence and contrary to law.

Dated this 23rd day of June, 1922.

Thomas Balmer, Edwin C. Matthias, Attorney for Defendant Great Northern Railway Company.

The foregoing exceptions were presented to and noted by me this 26th day of June, 1922.

Ed. E. Hardin.

We hereby acknowledge service of the foregoing exceptions to findings, etc., and the receipt of a true copy thereof, this 26th day of June, 1922.

Walter B. Whitcomb, Attorneys for Plaintiffs

[File endorsement omitted.]

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[fol. 73] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

ACKNOWLEDGMENT OF NOTICE OF FILING STATEMENT OF FACTS—Filed July 14, 1922

The St. Paul, Minneapolis & Manitoba Railway Company, a corporation and Walker D. Hines, as Director General of Railroads, hereby acknowledge that they have been served with written notice of the filing of the proposed Statement of Facts in this cause by the defendant, Great Northern Railway Company, on the 14th day of July, 1922.

Dated this 14th day of July, 1922.

St. Paul, Minneapolis & Manitoba Railway Company, a Corporation, and Walker D. Hines, as Director General of Railroads, by Thomas Balmer, Their Attorney.

[File endorsement omitted.]

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[fol. 74] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

ORDER FIXING AMOUNT OF SUPERSEDEAS BOND—Filed August 28, 1922

Upon motion of the Defendant, Great Northern Railway Company, for an order fixing the amount of the supersedeas bond necessary to effect a stay of proceedings upon the appeal of said defendant from the judgment and decree entered in the above entitled cause on June 21st, 1922.

It is ordered that the amount of such supersedeas bond be, and the same is hereby fixed, at the sum of four thousand dollars ($4,000) said amount being deemed by the court sufficient to save the plaintiffs harmless from damages by reason of the appeal.

Done in open court this 28th day of August, 1922.

W. P. Brown, Judge.

O. K. Walter B. Whitcomb, Attorneys for Plaintiffs.

[File endorsement omitted.]

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[fol. 75] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed August 30, 1922

To the above named Plaintiffs, Charles W. Reed and Dora Reed, his wife, and to Messrs. Walter B. Whitcomb and F. M. Hamilton, your attorneys, and to the above named defendants, St. Paul, Minneapolis & Manitoba Railway Company, a corporation, and Walker D. Hines, as Director General of Railroads;

You and each of you will please take notice hereby that the above named defendant, Great Northern Railway Company, a corporation, being aggrieved by the final judgment and decree entered in the above entitled cause on the 21st day of June, 1922, does hereby appeal from said judgment and decree to the Supreme Court of the State of Washington.

This appeal is taken from the whole of said judgment and decree and from each and every part thereof, except the provision for the dismissal of this action as to the defendants, St. Paul, Minneapolis & Manitoba Railway Company and Walker D. Hines, as Director General of Railroads.

Dated this 29th day of August, 1922.

Thomas Balmer, Edwin C. Matthias, Attorneys for Defendant Great Northern Railway Company.

[fol. 76] Due and timely service of the foregoing notice of appeal, in the manner required by law for the service of papers in civil actions and proceedings, is hereby acknowledged at Seattle, Washington, this 29th day of August, 1922 by the defendant, St. Paul, Minneapolis & Manitoba Railway Company, a corporation and Walker D. Hines as Director General of Railroads.

Thomas Balmer, Edwin C. Matthias, Attorneys for Defendants, St. Paul, Minneapolis & Manitoba Railway Company and Walker D. Hines, as Director General of Railroads.

[File endorsement omitted.]
(Recorded in Journal B-15 at page 419.)

We hereby acknowledge service of the foregoing Notice of Appeal and the receipt of a true copy thereof, this 30th day of August, 1922.

Walter B. Whitcomb, by F. M. Hamilton, Attorneys for Plaintiffs.

[fols. 77 & 78] [Title omitted]

APPEAL AND SUPERSEDEAS BOND FOR $4,200—Filed August 30, 1922; omitted in printing

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[fol. 79] IN THE SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

PRÆCIPE FOR APPEAL TRANSCRIPT—Filed October 24, 1922

To the Clerk of the above entitled Court:

You will please prepare, certify and file in your office, for transmittal to the Supreme Court of the State of Washington, an appeal transcript in the above entitled cause, consisting of the following:

1. Summons, complaint and proof of service.

2. Demurrer of Great Northern Railway Company, and Walker D. Hines, Director General of Railroads.

3. Order overruling demurrer.

4. Answer and disclaimer of Walker D. Hines, Director General of Railroads.

5. Answer and cross complaint of defendant, Great Northern Railway Company.

6. Reply to answer and cross complaint of defendant, Great Northern Railway Company.

7. Defendants' proposed Findings of Fact and Conclusions of law.

8. Defendants' exceptions to the refusal of the Court to make Findings of Fact and Conclusions as proposed by defendant.

9. Findings of Fact and Conclusions of law.

10. Judgment.

11. Decree.

12. Defendants' Exceptions to Findings of Fact, Conclusions of Law and Decree.

13. Acknowledgment of notice of filing Statement of Facts.

14. Order fixing amount of Supersedeas Bond.

[fol. 80] 15. Notice of Appeal and Proof of Service.

16. Appeal and Supersedeas Bond and Proof of Service.

Dated this 23rd day of October, 1922.

Thomas Balmer, Edwin C. Matthias, Attorneys for Defendant Great Northern Railway Company.

[File endorsement omitted.]

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[fol. 81] STATE OF WASHINGTON, COUNTY OF WHATCOM

[Title omitted]

CLERK'S CERTIFICATE

I, Geo. M. Cook, Clerk of the said Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to tran-mit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court, this 10th day of November A. D. 1922.

Geo. M. Cook, County Clerk and ex Officio Clerk of the Superior Court. (Seal.)

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[fol. 82] IN SUPERIOR COURT OF WHATCOM COUNTY

[Title omitted]

**Statement of Facts**—Filed Jul. 14, 1922

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[fols. 83 & 84] [Title omitted]

Service of a true copy of the within proposed statement of facts is hereby acknowledged this 14th day of July, 1922, and true copy received, such service being made after the filing thereof

Walter B. Whitcomb.

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[fol. 85] Index omitted.

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[fol. 86] [Title omitted]

Be it remembered that heretofore and on to-wit, June 23, 1920, at the hour of 9:30 o'clock A. M., the above entitled and numbered cause came on for trial before the Honorable Ed. E. Hardin, one of

the Judges of the above entitled court, proceeding in Department No. 2 thereof, at the Whatcom County Court House, in the city of Bellingham, Whatcom County, Washington, sitting without a jury;

The plaintiffs appearing by Walter B. Whitcomb, Esq., and Francis M. Hamilton, Esq., their attorneys and counsel;

The defendants appearing by Thos. Balmer, Esq., its attorney and counsel;

And both sides having announced they were ready for trial;

Whereupon the following proceedings were had and testimony given, to-wit:

(Whereupon Mr. Whitcomb made an opening statement to the Court of the plaintiff's case, and whereupon Mr. Balmer made an opening statement to the Court of the defendants' case).

[fol. 87] W. J. TINCKER, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. Where do you reside, Mr. Tincker?

A. I reside at Glacier and I have a homestead in Glacier, but I live in Bellingham—2638 Xenia Street, Bellingham.

Q. What is your business?

A. I am foreman out at the Larsen Mill.

Q. How long have you lived in this county?

A. 31 years.

Q. Are you a citizen of the United States?

A. I suppose I am. I was born in the United States—born at Eastport, Maine.

Q. How old are you?

A. I am going on 49 years old—49 years old in June.

Q. Where were you living in 1901?

A. I was living in Maple Falls

Q. What were you doing there?

A. Well, I was working—building a shingle mill for Gerdrum and Caulkins, when they built the first shingle mill at Maple Falls.

Q. Are you acquainted with the real estate described as the southwest quarter of the northwest — of Section 3, Township 39, Range 6 East?

A. Yes, sir.

Q. Have you ever been upon this piece of land?

A. Yes, sir.

Q. Did you ever make any claims to the land in any way?

[fol. 88] A. Yes, sir.

Q. Will you please state to the Court what that was—what you did?

A. I went up in 1901 and selected the land and put up my notices.

Q. What time?
A. September or October. It was around there. I suppose it was in the fall.
Q. 1901?
A, 1901. My brother was with me. He is down in Seattle now.

The Court: That was in September?
The Witness: Either September or October. Somewheres along there. It was in the fall, and I put my notices on there.

Q. Let me ask you just right now, had you ever taken any Government lands before?
A. No, sir.
Q. What did you do when you went upon this land at that time?
A. I was around the corners—blazed around the land. There was an old survey there and I put my notices on the corners. I put it on the squares. I didn't take all the land that Reed was taking.
Q. What land did you claim at that time?
A. I claimed the northwest corner of Section 3, right in the square that includes the 40 of Mr. Reed.
Q. You say that you blazed a line around?
A. I blazed a line around so that I could always follow it, and I put my notices on the four corners of the claim.
Q. What were the four notices that you put on?

Mr. Balmer: I object to that as not the best evidence.

Q. Have you any of those notices that you put on there?
[fol. 89] A. No. I didn't keep those notices.
Q. Do you know where the notices are?
A. I know where they were, but they are off of there now because Smithy has taken off mine and put his on top of them.
Q. What were done with those when they were taken down?
A. I suppose they were thrown away—just like anyone would do—would pull them off and throw them down.
Q. What were the contents of these notices?

Mr: Balmer: I object to that question upon the ground that there is no proper foundation as yet laid, and it does not call for the best evidence.
The Court: The notices would be the best evidence, but as I understand the witness they were lost or thrown away.
Mr. Balmer: He says that he supposes that that is what occurred.
The Court: Well, do you want to cross-examine him on that proposition?
Mr. Balmer: No.
The Court: Well, he may answer.
Mr. Balmer: Exception.
The Witness: I may have taken them home and burned them up for all I know.
The Court: As I understand it, you do not know where they are?
The Witness: No, sir.
The Court: But you think they are destroyed?

The Witness: Yes, sir.
The Court: This has been since 1901?
The Witness: Since 1901 or 1902.

Q. What did these notices say?

[fol. 90] Mr. Balmer: I desire to make my objection to that.
The Court: Is there any question about the existence of these papers? If there is I would like to know about it.
The Witness: No, no question about it.
The Court: If they are gone, why, secondary evidence will certainly be received.
Mr. Balmer: Of course, it does not appear that they are gone at this time. It merely appears that so far as the witness knows he supposes they were torn down and thrown away.
The Court: If I caught the names mentioned by Mr. Whitcomb in his opening statement, all the people in line of successorship are here, are they not?
Mr. Whitcomb: They are all here.
The Court: And have you investigated to see whether you could find those notices or not? If there is any cloud as to where they are—whether they are in existence or not—why, of course, they must be produced. Otherwise we will go ahead this way. These witnesses, as I understand, are all here—these parties are all here whose names have been mentioned in line of successorship. He may go ahead.
Mr. Balmer: Exception.
The Court: Note it.

Q. You may answer the question, Mr. Tincker.

The Court: Read the question to the witness.
(Question read as follows: What did these notices say?)

A. I wrote on the notices "I hereby claim this section—this 40-section as my homestead," the same as anybody would put the notices on under the law.
Q. Did it describe the land?
[fol. 91] A. Yes, it gave a description of the land.
Q. How was it described?
A. It was described as the Northwest quarter of section 3 in township 39 and north range 6. That is what the land is. I took it in a square—kind of in a square.
Q. And your name was signed to the notice?
A. Yes, sir, and the witnesses, too. There was the name of my brother from Seattle and there was somebody else's. I don't remember whose name it is now.
Q. How were they posted?
A. Cut in a tree in the corner and tacked up with tacks and little pieces of wood put on the top to keep the rain from washing them out or destroying them.
Q. When were they posted?
A. They were posted in 1901, when I squatted—in September or

October. Between there some time. It is pretty hard for a man to remember the exact dates as far back as that was. I didn't put it down with pencil or anything—pencil or ink.

Q. And did you ever see those notices afterwards?

A. Yes, sir. In 1906, when I went in and sold it to Smithy.

Q. Do you know whether they were constantly kept on this land during this time?

A. I know that I kept them on.

Q. Do you know, Mr. Tincker, whether they were ever down—if there was ever a time during that time when these notices were not on there?

A. I never noticed any. I noticed when they were kind of blot out—some of them that were not protected just right, and I would put on others to replace them.

[fol. 92] Q. Were the notices still on there at the time that you transferred your claim to Smithy?

A. As far as I know they were all right.

Q. What else did you do upon this land?

A. I didn't do anything on it "until 1902—in the Spring between February—well, it was about March as near as I can get at it—between February and May. I went up and blazed a trail across the land and laid a foundation for a cabin."

Q. Where was this trail that you blazed?

A. Across the river, right on the slope—at the place that they call the big slope, right across from Maple Falls.

The Court: That shows up on the right of the river going up?

The Witness: Yes, sir.

Q. Did this trail extend across the southwest quarter of the northwest quarter?

A. No, it didn't extend direct. It extended across Mr. Magner's and some other claims and across the northwest corner of my claim.

Q. Now, did anything occur or transpire in regard to this property about this time in 1902?

A. Not that I know of.

Q. Well, to refresh your memory, was the land withdrawn from settlement, or were you so informed?

A. Yes, sir.

Mr. Balmer: Just a minute. That is objected to as not the best evidence.

The Court: No, I apprehend it is not.

Mr. Balmer: And it is incompetent, irrelevant and immaterial and not within the issues of the case either.

[fol. 93] Q. Did you have any correspondence with the General Land Office or the Interior Department of the United States in regard to this land?

A. Yes, sir.

Q. Have you that correspondence?

A. No, sir. Mr. Reed wanted me to get it, and my wife looked over all my papers that I keep, for over a good many years, and

finally she said that she thought these were no good and that she had thrown them out or burned them up. She told Mr. Reed that.

Q. What was that correspondence?

Mr. Balmer: I object to that as no foundation laid.

The Court: You are speaking of correspondence with the Government. I apprehend that you can get a copy of every instrument that the Government has sent out for the last 40 years or 20 years. We understand something of the system that the Government has. I think those are in duplicate.

Q. Was this township surveyed—was there an accepted survey, if you know, so that it could be filed upon at the time that you entered?

Mr. Balmer: I object to that as calling for a conclusion of the witness, as to whether or not there was a survey which could be filed upon.

The Court: Yes.

The Witness: Well, it was withdrawn for coal entry.

Mr. Balmer: Just a moment. I move to strike out the answer.

The Court: Yes, it may be stricken.

Q. Did you make any filing upon the land?

A. No, sir.

Q. Why?

[fol. 94] A. I could not make a filing. It was supposed to be withdrawn for coal entry.

Mr. Balmer: I move to strike out the statement "it was supposed to be withdrawn for coal entry" on the ground that it is merely the conclusion of the witness and not the best evidence.

The Court: No, it is not the best evidence. The Government has a way of doing those things, as I understand it.

The Witness: Sure.

Mr. Whitcomb: May it please the Court, this witness has a reasonable time within which to act as a squatter in establishing his home and making his filing upon this land. It is our contention that information that he was given by the Government is very material as to this question as to why they did things, and it is for the purpose of showing why his filing was not made and why residence was not established upon this land that we ask him these questions.

The Court: Well, the proposition is the matter of proof and he Court's idea, as expressed, and I intend to make it plain to you gentlemen, is that if the Government took the action that he undertakes to outline here, or he is seeking to prove, that is a matter of primary evidence. That is the idea.

Q. I will ask you, Mr. Tincker, if you received from the Interior Department of the United States, or from the General Land Office a letter to the effect that you should continue your claim as a squatter to this land, and that the land would probably be set out of the land that was withdrawn as coal lands.

[fol. 95] A. Yes, sir.

Mr. Balmer: Just a moment. I object to that question as incompetent, irrelevant and imaterial, and that it does not call for the best evidence and no foundation for secondary evidence has been laid, and that the question is not within the issues in the case, and I might say with reference to the latter part that the allegations of this complaint are that there was a settlement upon those lands by Mr. Tincker. This evidence seeks to excuse him for not having made the settlement and that is not even in issue in the complaint.

The Court: I think the objection is good on the proposition that no foundation has been laid for secondary evidence.

Mr. Whitcomb: This is calling for a fact as to whether he received such a letter.

Mr. Balmer: That would be immaterial.

The Court: I think you incorporated the alleged contents or the purported contents of the letter. If he received the letter pertaining to the mater of settlement, he can answer that by yes or no, but if you attempt to have him answer a question that incorporates the body of the letter, that won't work. It would be easy to get this correspondence from the Government, I take it, and there would be no question of hazy recollection of some twenty years ago. It will be there just as it was.

Mr. Whitcomb: We wish an exception to the ruling of the Court in this matter.

The Court: Note it.

Mr. Whitcomb: We offer to prove by this witness at this time that in the year 1902 Mr. Tincker received a letter from the United [fol. 96] States Government that this land would probably be set out and withdrawn from entry as being within territories withdrawn as having coal deposits on them, and that in the meantime he might continue to hold the same as a squatter.

Mr. Balmer: Same objection.

The Court: The objection made that it is not the best evidence is good.

Mr. Whitcomb: And I will add to that offer of proof, that in the opinion of the Government this land would probably be excluded from the reserve and that Mr. Tincker would have the prior right to enter the same.

Mr. Balmer: Same objection.

The Court: Objection sustained.

Mr. Whitcomb: Note our exception please.

The Court: Note it.

Mr. Whitcomb: And now, Your Honor, we ask leave to supply, if it is possible to secure the same from the Government, copies of those letters between Mr. Tincker and the Government. This will have to be secured from Washington. We cannot subpœna the Government, and I do not know of any way whereby we can compel them to give it to us except to ask them.

The Court: Ample opportunity will be afforded, gentlemen, to either side to secure any data that may be material in this matter. I want to get at the very vitals of the case. If there has been a fault visited here, as you contend and as your theory of the case suggests,

we want to know it. If you are wrong, we want to know that. You are entitled to a reasonable opportunity to supply any evidence that [fol. 97] is material in the case. It strikes me that the objection there ought to have suggested itself to you in the preparation of the case.

Mr. Whitcomb: Well, may it please the Court, we did not know of the existence of this until a short time ago, and that time was not sufficiently long to permit us to secure these matters.

The Court: That would be a greater reason why the Court ought to give you a chance to secure it. I do not determine cases on technicalities, unless I have to.

Mr. Whitcomb: There is other evidence that we expect to submit that will indicate the same matter. However, it is not directly to the point.

Q. Did you, subsequent to your squatting upon this land, have any dealings with Walter Smithy in regard thereto?

A. Yes, sir.

Q. What were they?

A. On August 1st—

The Court: (Interrupting) What year?

A. (Continuing:) On August 1, 1906, I sold to Walter Smithy. He and I went over the land and he wanted to buy some. My wife was sick and I didn't want to go up there, and I sold it to him. He went up and put his notices over where mine were.

Q. Did you go around this land with him?

A. Yes, sir.

Q. And what did you do?

A. Just took my notices down and put his on, and he gave me $5.00 there. When the foundation was laid he paid me $5.00 and when we came downtown a little after that I got the balance of my [fol. 98] money.

Q. Did you give him any written documents when you made this transfer?

A. I think I gave him a receipt for the land and stated that I gave him my right in the homestead.

Q. Did you describe the land?

A. Yes, sir.

Q. Do you know what Mr. Smith did after it was transferred to him?

A. He went up to the ranch a while after that and went to work.

Q. Did you ever see him up there?

A. I have seen him go up there. I never followed him up, because I was awfully busy at that time. He done his own work; cleaned out the trail more and did quite a few things while he was there.

Q. Have you been upon the land frequently since you transferred your rights?

A. Three times since Mr. Reed has built his home and cleared his land up there.

Q. When were you first up there when Mr. Reed was there?

A. Well, I cannot tell you when it was. It was—one time it was when he was just starting in to build the house and one time I was up there hunting, and I have seen him in his house and I have seen the trees and fruit, of course. I go up in the fall, and there is not very much to see then. But I don't go up there very often because I have no reason to—have not been there for years.

Q. Do you know when Mr. Reed went on the land?

A. No. I cannot swear to that.

[fol. 99] Q. About the year?

A. He took possession of it after he bought from Smithy.

Q. And do you know about when that was?

A. No. I cannot remember it because it did not concern me at all then. So I just let it drop. I cannot remember it exactly.

Q. When you have been there upon the land what have you seen? Was Mr. Reed alone, and what did he have there and what did he do there?

A. Mr. Reed never was up there while I was there, at no time. I never saw him there because I just happened to go right by. My brother has been up there lots of times.

Q. Was Mr. Reed's family there?

A. His wife—she was supposed to live there. Of course, she might be over to the Falls, but he was working all the time in the camp and he went home nights and they all went home nights.

Mr. Balmer: I move to strike out the answer on the ground that the witness says that she is supposed to live there. Find out what he saw.

The Court: You can cross-examine him. As I understood him, he saw them going and coming.

The Witness: Sure.

The Court: That is the way I understood him.

Mr. Balmer: I didn't so understand him.

The Witness: Well, his house was there, and they lived there and she goes downtown, the same as I would if I had my house there with my family. You can go to town there if you want to and come back at night.

Q. Do you know whether Reed was claiming this land as his home?

[fol. 100] A. He claimed it as his home—the only home that he had. He would not have put himself on it if he didn't.

Q. How long have you known Mr. Reed?

A. I have known him ever since—I think it is since 1902 or 1903—I am not sure which.

Q. What was he doing when you first knew him?

A. He came to Maple Falls to work for Mr. Fobes.

Q. Do you know when he left Maple Falls?

A. When he left?

Q. That is, when he left the town or village?

A. The only time that I have known him leaving the Falls was

to go on his home. He has worked back and forth ever since as far as I know.

Q. Did you ever at any time know of any claim that was made or asserted to this land by the St. Paul, Minneapolis & Manitoba Railroad Company.

Mr. Balmer: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Balmer: Exception.

The Witness: No, sir.

Q. Did you ever see any one on this land, or about the land that you knew had any connection in any wise with the St. Paul, Minneapolis & Manitoba Railroad Company, or with the Great Northern Railway?

A. I know of a man that just went through the country cruising and scripping, Mr. John O'Donnell. He is dead now. I believe he hunted up land to be stripped—that is, from his talk anyway.

Q. Did he ever talk to you about this land?

[fol. 101] A. No, sir, he never talked to me about the land.

The Court: Just answer that by yes or no.

The Witness: He never talked to me, but he knew very well——

Mr. Reed (interrupting): Just a minute. I object.

The Court: You need not tell what he knew.

Q. Did you claim this land as your homestead from the time that you first squatted on it in 1901 up to the time that you sold out to Smithy?

Mr. Balmer: That question is objected to. Same undisclosed plan that he had could not have any bearing on other parties.

The Court: I will let him answer that. It would not of itself be important, but if he was around there and doing things his attention with respect to that might be material.

Mr. Balmer: Exception.

Mr. Whitcomb: Answer the question.

A. Sure. I intended to hold it—intended to hold it as a homestead, expecting some day to go up there and live on it, but the Government would not let me have it. They would not let me file.

The Court: I don't quite understand that. That is your explanation in connection with what?

The Witness: I could not get it from the Government. They would not allow me to file and take it so that I could go on it.

Mr. Balmer: I object to the statement that the Government would not let me take it and would not allow him to file on it and that he could not take it, on the ground that it is incompetent, irrelevant and [fol. 102] immaterial and not in response to the question. I ask that part of it be stricken.

The Court: That part may go out. He was answering in respect

to his intention. I understood his intentions were that he wanted the place for a homestead and he intended to take it if he Government would let him have it.

The Witness: Yes, sir.

The Court: That is the sum and substance of it boiled down.

The Witness: Yes, sir.

Mr. Whitcomb: You may take the witness.

Cross-examination.

By Mr. Balmer:

Q. Are you a married man, Mr. Tincker?

A. Yes, sir, I guess I am.

The Court: Well, do you know.

The Witness: I have got eight children. I ought to be married.

The Court: You know. We are making a record here.

The Witness: Yes, sir.

Q. How old is your oldest child?

A. He is 21 and over.

Q. What are the ages of your other children?

A. You will have to ask the wife. I cannot remember the ages at all.

The Court: The Court understands that fully.

Q. What is the age of the next to the oldest one?

A. Oh, she is 18, or so.

Q. In what year were you married?

A. Me?

Q. Yes.

[fol. 103] A. You have got me. It is right here in the Court House, on record.

The Court: Well, you can give about the time, can you not?

The Witness: I have been married 23 years.

The Court: 23 years?

The Witness: Yes, sir.

Q. Did you ever take Mrs. Tincker and the children to live on this land?

A. No, sir.

Q. Where were they living in September and October, 1901?

A. They were living in Maple Falls.

Q. In a home down there that you owned or rented?

A. No sir. Just a rented place.

Q. Living in a home down there which you paid rent for?

A. Yes, sir.

Q. That is where you made your homestead too?

A. No, sir. That was my home. That was where I lived.

Q. That is where you lived.

A. Yes, sir.

Q. How long did you continue to live there?

A. At Maple Falls?

Q. Yes.

A. Oh, I lived there eight years.

Q. Eight years?
A. Yes, sir.
Q. What years were those?
A. What years were those?
Q. Yes.
A. Why, they were the years between the time that I went there and when I left.
[fol. 104] Q. All right. What year did you go there?
A. I went there in 1901.
Q. And you came away then in 1909?
A. I didn't go away from there. I went to Sumas and other places and then back home—to Maple Falls, and then to Glacier and all around the country. I have got a homestead in Glacier now. I was in business in Maple Falls, in the meat business, for eight years.
Q. Then you were in the meat business for eight years, from 1901 to 1909?
A. No, sir. I went up there to build a mill and I was in that before I went in the meat business.
Q. You were in the meat business for eight years in Maple Falls, and prior to that time you were in the mill business?
A. Yes, sir.
Q. How long were you in the mill business?
The Court: Is that the mill that was on Silver Lake?
The Witness: Yes, sir. I was working for the mill company.
Q. Where did you and your family live when you were working for the logging company or mill company?
A. We lived in Maple Falls.
Q. Your family lived in Maple Falls then for ten or eleven years?
A. My family lived in Maple Falls for ten or eleven years?
Q. Yes.
A. We have lived in the country for thirty years, but I have not lived in Maple Falls all the time.
The Court: When you went around to these different places that you mentioned, did you take your family with you?
[fol. 105] The Witness: Yes, sure, to some of them.
Q. The family went with you?
A. Yes, sir.
Q. And you lived with the family?
A. Yes, sir.
Q. You had some children born between 1901 and 1906?
A. I suppose so.
Q. The children came along at regular intervals, about two or three years apart, didn't they?
A. Yes, sir.
Q. You say that your brother was a witness to the first notices that you put up?
A. My brother and I went all over that country. He and I were always together.
Q. You and he used to travel around together hunting?
A. Yes, sir.
Q. Did you ever do any locating for homesteaders?

A. Once in a while, if they wanted it.

Q. You knew the woods up there pretty well, didn't you?

A. Well, I knew them fairly well.

Q. Now, as I understand it, what you did in September or October, 1901, was this, you posted some notices on the four corners of the northwest quarter of Section 3, is that right?

A. Yes, sir.

Q. There were some survey posts up there at that time, were there?

A. The old survey was there.

Q. What?

A. The old survey was there.

[fol. 106] Q. There has been a new survey since then, hasn't there?

A. Yes, sir.

Q. Do you know about when the new survey monuments were put in?

A. I cannot just remember. It was a while after that. I cannot remember the dates exactly because I was never concerned with it.

Q. Well, was it before 1906 that the second survey was made up there?

A. Well, I cannot swear to that at all. If I don't know a question I ain't suppose to answer it, because I would not perjure myself for anything.

Q. Have you seen the new survey posts up there?

A. Yes, sir. I have seen the new township lines.

Q. When?

A. About three years ago, the time that I was up there last.

Q. Are the new posts pretty close to the old ones?

A. Well, they are so many rods—I have forgotten how many rods there are there. I don't have to go to those posts to look at them. When I go up there hunting, I don't have to go to the posts to see the line.

Q. I see.

A. The posts don't concern me any how.

Q. Your brother lives where?

A. In Seattle.

Q. He is not here as a witness?

A. No, sir. He is in Seattle.

Q. You say that it is a little hard to remember the exact dates at which you did these things?

A. Sure. It would be at this time of the year.

[fol. 107] Q. That was about 19 years ago?

A. 19 years ago?

Q. Yes.

A. Yes, 1901.

Q. Are you certain that it was in 1901 that you put up those first notices?

A. I am certain of that. It was the time that McKinley was shot, and I guess it was pretty near that time. That is the reason why I remember it so distinctly.

Q. Did you put up those notices before or after McKinley was shot?

A. Afterwards.

Q. Afterwards?
A. Yes, sir.
Q. A short time afterwards or a long time afterwards?
A. Well, I moved to Maple Falls right after he was shot and it was quite a little while after that that I put up these notices.
Q. It was quite a little while after that that you put up these notices?
A. Well, I don't know just how long it was. It was that year.
Q. The same year?
A. Yes, sir.
Q. The fall of the same year?
A. I think so.
Q. What time of the year did you move to Maple Falls?
A. What time did I move there?
Q. What time of the year, yes.
A. Oh, I moved up there, I think it was in September or October.
[fol. 108] I ain't sure. My wife knows exactly. She can always remember these things. We moved from Mount Vernon there.
Q. You moved from Mount Vernon there?
A. Yes, and my brother and I went up. He didn't move at the same time, but I moved there in August or September some time.
Q. But you don't remember what year that was.
A. What year?
Q. Yes.
A. I think it was in—about 1901, wasn't it—1900?
Q. What is what I am asking you. Do you remember just what year it was?
A. No, I don't remember exactly.
Q. And you would not be sure whether it was 1901 or 1902?
A. Well, I can mighty soon tell.
Q. Well, I would like to have you tell.
A. Yes, sir.
Q. How can you tell?
A. Well, I can tell by the girl. She was born in Everett and she is 18, going on 19 years old, and she was just a baby then.

The Court: Was she walking yet?
The Witness: What?
The Court: Was she walking yet when you went up there?
The Witness: I don't think so. My wife knows just exactly what date she was born. I didn't pay any attention to that.

Q. Which of your children was that?
A. Elma. She is here at Smaby's.
[fol. 109] Q. Was she your second child?
A. Yes, sir.
Q. Where did you say she was born?

The Court: Everett, he said.
The Witness: I said Everett, but I mean Mount Vernon.

Q. She was born at Mount Vernon?
A. Yes, sir.

Q. And when you moved from Mount Vernon she was not talking yet, is that right?

The Court: I asked him here if she was walking yet, not talking.

A. I don't know anything about that.

Q. You don't know.

A. That is immaterial to this case. I am working all the time and I never paid any attention to those things, and I had a business to look after.

The Court: If you want to bring your wife here, who, no doubt, knows more about those things than you do, that is all right.

The Witness: I have got witnesses here that knows more about it than I do, as far as that goes—knows more about it than I do. I never paid any attention to things like that.

Q. I am not trying to annoy you at all, but, of course, we are all here to get at certain facts, and this lawsuit is going to depend on facts, and I am asking you for facts.

A We are all trying to give you facts right up to this date—right up to 1919.

Q. Your second daughter was born in Mount Vernon?

A. Yes, I suppose she was.

Q. Well, do you know?

[fol. 110] A. The second child was born in Mount Vernon. That is the second child.

Q. And you fix the time that you moved to Maple Falls by the age of your child, do you?

A. That is what my wife was saying. That is all I know. She was talking about it.

Q. Then it was your wife that told you how old this child was when you moved to Maple Falls; is that right?

A. Told me?

Q. Yes.

A. I never pay no attention to the ages. She knows the ages of the children.

Q. You don't know how old this daughter of yours was when you moved to Maple Falls?

A. No, I don't.

Q. You don't?

A. I don't remember now.

Q. Now, the Court asked you if she was walking yet. Do you remember that?

A. No, I don't remember that.

Q. And you don't remember whether you moved to Maple Falls in 1901 or 1902; is that right?

A. It was 1901, I believe.

Q. Why do you believe that?

A. Well, because we have been there—I have been there now—in this country here for quite a little while—you see 12 years I was there in Maple Falls, and then I went to Sumas, or to Ten Mile

and I lived alongside of Mr. Jordan, and then I went to Sumas and then went back to Maple Falls. I have got plenty of proof that [fol. 111] I was there. You have got me muddled up on the dates because I don't pay any attention to them.

Q. You don't pay any attention to dates?

A. Not to those dates.

Q. That is what you want us to understand?

A. Yes, sir.

Q. And you don't know whether it was 1901 or 1902 that you moved to Maple Falls?

A. It was in that year.

Mr. Hamilton: We object to the question as it has been answered.

The Court: He said a while ago that it was 1901. I gather now, from what he says, that he is depending to some extent upon the evidence of others whom he has consulted with. I take it, naturally, that he has been refreshing his memory as to dates.

Q. Is that right?

A. Sure. I know when I was there, and they know when I was there.

Q. Well, do you know when you were there—do you?

A. Sure I know when I was here.

Q. If you know when you were there why have you been talking it over with other people to refresh your recollection?

A. I know that we went up there from this—from my wife and others—as to when we went up there.

Q. Are they here?

A. No, sir.

Q. Have you talked with them?

A. That has nothing to do with this case. I am here to show that I filed for this land, and that is all there is to it. My notices were in 1901. I can remember that positively.

[fol. 112] Q. How can you remember that positively?

A. Because I can. Because I put them there. I didn't pay any attention to my children's ages and all those dates, but when I put a thing on a post I know what I put there, really I do—that is, I know when I do it.

Q. And did you date that notice?

A. Yes, sir.

Q. What date did you put on it?

A. Some time in September or October, one or the other.

Q. What year?

A. 1901.

Q. 1901?

A. Yes, sir.

Q. Is that the year that McKinley was shot?

A. As near as I know it is—right after that.

Q. Now, you told us a short time ago that the way you knew the time you went up there was because it was about the time that McKinley was shot?

A. Yes, sir, about that time.

Q. And you put these notices up there some time after that?
A. Yes, sir.
Q. How long did you spend on the land at the time you put the notices up?
A. From two to three hours.
Q. You spent two or three hours running around the section line?
A. Yes, sir.
Q. You didn't stop there at that time and build anything?
A. No, sir.
Q. The first time you were up there to make any trail or anything [fol. 113] of that kind was in the spring of the year following the time that you put up the notices?
A. Yes, sir.
Q. About what time in the spring?
A. About March.
Q. About March?
A. February, or April. Somewhere along there.
Q. What did you do that March?
A. What did I do?
Q. Yes.
A. I cut a trail on the hill. Just blazed it out so that a man could see where to go up there, and I cut poles and laid a foundation.
Q. Did this trail come up across the land that Magner owns now?
A. I don't think it was right on his land, but it was right under, below the section line then.
Q. You mean north of the section line?
A. Yes, sir, and west.
Q. North and west?
A. Yes, sir. It run up north and west.
Q. It run up from the Nooksack River up to your corner?
A. Yes, sir
Q. What corner?
A. To the northwest corner—right down to the northwest.
Q. The northwest corner of section 3?
A. Yes, sir.
Q. And how close to that northwest corner of three did you put this foundation that you speak of?
A. Oh, it was right a little west across from the corner.
[fol. 114] Q. In what direction from the corner?
A. East.
Q. East?
A. Yes, sir.
Q. How many feet, about?
A. Oh, I didn't measure the feet. I don't know about that.
Q. Well, how far was it?
A. Well, I cannot tell you anything about that. I didn't step it off and I never measured it. I just walked over there and started a foundation. It is there, so that you can see it.
Q. Can you make an estimate to determine how far it was from the corner?

A. It doesn't make any difference, as long as it is on that corner. It might have been half way across, and probably not that far, or maybe a little further.

The Court: Across the quarter section?
The Witness: Across the 40.
The Court: Across the first 40 that you touched from the northwest corner?
The Witness: Yes, sir.

Q. That would be lot four now?
A. Yes, sir.
Q. Is that inside of lot four, according to the new survey?
A. Yes, sir.
Q. How far south from the new line of lot four is it?
A. I couldn't tell you because I have never been over there since the new survey was put down, or the new line.
Q. You cut down some posts at that time, you say?
A. Yes, sir.
[fol. 115] Q. How many?
A. I don't know how many it was. I laid a foundation—put a few logs—small logs.
Q. Small, second growth trees?
A. Poles like everybody would do.
Q. And how much of a foundation did you build? How high did you build it?
A. I cannot recollect how high it was now.
Q. Did you put down the four posts—the four poles for the four sides of the foundation?
A. I think it was more than that. I think I did a little more than that.
Q. You never built a cabin there to live in, did you?
A. I never built a cabin there to live in, no.
Q. And you never did live in that cabin where you put this foundation down?
A. No, sir.
Q. And neither did any member of your family?
A. No, sir.

The Court: Did you do any slashing there, other than the trail and foundation work?
The Witness: Just the trail and foundation, that is all.

Q. Smithy paid you $5.00 up there on the land when you showed it to him?
A. I think he did, yes, sir.
Q. How much more did he pay you down in town?
A. I think he paid me $25 altogether?
Q. $25 altogether?
A. Yes, sir.
Q. You say that you had located other people in the woods as
[fol. 116] homesteaders—for homestead claims?

A. Well, I never located any that I got any money out of. They were all dead beats.

Q. They were all dead beats?

A. They were all dead beats but one fellow.

Q. As I understand it then, you located a good many people around that never paid you anything?

A. No, I never was paid.

Q. How many did you locate?

A. I don't think that I located more than two in that country.

Q. Did you build a good many cabins in that country?

A. No, sir, I have not built many of them. My brother and Lewis Jarret, they built most of the cabins there.

Q. Well, you helped them build some?

A. No. I just went up there hunting while they were building the cabins.

Q. On some of these lands where these cabins were you located these two or three people that you speak of?

A. No, sir.

Q. What were they building those cabins for?

A. The people were already located.

Q. What?

A. The people were already located, and he built the cabins for them.

Q. You were up over this land from 1901 to 1906 about once a year?

Q. Yes, sir. I think I was over these once a year all right.

Q. Usually in the fall, when you would go hunting?

A. Yes, sir.

Q. Did you, every year when you were up there,—did you run [fol. 117] around the lines of the quarter to see whether they were still there?

A. I put my notices up every year.

Q. Every time in the fall, when you would go up, you would put up——

A. (Interrupting.) Sometimes I would not go up in the fall. Sometimes I would go up there in the summer.

Q. About how many times would you say that you were up there a year on an average during that time?

A. I would not say that I was up there any more than once or twice a year on an average.

Q. You were not up there any more than once or twice a year on an average?

A. No, sir.

Q. You have another homestead claim now?

A. Yes, sir.

Q. Where is it?

A. In Glacier, in the Forest Reserve.

Q. In Glacier, in the Forest Reserve?

A. Yes, sir.

Q. Have you ever claimed any other land as a homestead?

A. No, sir.

Q. Just this Reed land and where you are now?
A. Yes, sir.
Q. How many times would you say that you have been up there since Reed went on?
A. Since Reed has been there?
Q. Yes.
A. I don't think I have been up there over three times since Mr. Reed went up there.
[fol. 118] Q. About three or four times?
A. Yes, sir, but I was there. Sure I was.
Q. You never found Reed there?
A. Well, I always knew where he was. He was always working.
Q. Did you ever see Reed up there when you were there?
A. No, I have never been up there and found him there.
Q. Did you ever see his family there when you were there?
A. Well, I saw Mrs. Reed on the trail once.
Q. You saw Mrs. Reed on the trail once?
A. Yes, sir. That is all that I remember.
Q. So that all the times that you have been up there you never saw Reed and you met Mrs. Reed just once on the trail?
A. Yes, sir.
Q. Do you remember what time of the year you have been up there since Reed went on this land?
A. No, I have not got the dates of them, but it was in the fall, when we would go up to hunt.

Mr. Balmer: That is all.
Mr. Whitcomb: That is all.

(Witness excused.)

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[fol. 119] G. A. KING, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. Where do you live, Mr. King?
A. Maple Falls.
Q. How long have you lived there?
A. Since 89.
Q. Maple Falls is located on your old claim, is it?
A. Yes, sir, part of it.
Q. What is your age?
A. Now?
Q. Yes.
A. About 74.
Q. And do you know W. J. Tincker?
A. Yes, sir.

Q. How long have you known him?
A. Well, that would be pretty hard for me to tell, how long. I don't just remember the year that he came in there. I have known him ever since he came to Maple Falls and that is quite a while ago.
Q. Are you acquainted with the land described as the southwest quarter of the northwest quarter of section 3, township 39, north of range 6, east?
A. I have seen it, yes, sir. I have been on to it.
Q. Did you ever see any notices posted upon the corners of this land, or upon the quarter section described as the northwest quarter of said section 3?
[fol. 120] A. I saw some notices on the corners.
Q. What were these notices, Mr. King?

Mr. Balmer: I object to that as not calling for the best evidence and no proper foundation has been laid for the introduction of secondary evidence, and it is incompetent, irrelevant and immaterial and the time is not fixed.
The Court: Well, fix the time.

Q. About what time was that.

The Court: I seem to have passed on the others.
Mr. Balmer: You passed on them tentatively.

A. About the year 1901 that I was up there.
Q. What were these notices?

Mr. Balmer: Same objection.
The Court: Let him answer. It is that same proposition—1901.
Mr. Balmer: Exception.

A. There were notices of Mr. Tincker's location there. I would not be sure whether it was 1901 or later than that, as I was through there very often.
Q. Mr. King, did you see the notices more than once?
A. Sir?
Q. Did you see the notices more than once?
A. Yes, sir.
Q. How often did you see them?
A. Well, I was through there sometimes maybe two or three times a week and then maybe not once a month or so. My business in there was running lines and locating people or parties in Seattle.
Q. What years were these?
A. It ran from 1901 to 1903 or 1904. Somewhere along, say—
[fol. 121] somewhere along there was about the last.

The Court: 1901 to 1904?
The Witness: Yes, sir.

Q. And during that time, when you were up in the vicinity of the corners of this quarter did you always see those notices of Tincker's?

Mr. Balmer: I object to it as leading.

The Court: Yes, it is leading.

Q. How many times did you see Tincker's notices on this land?
A. Well, four or five times anyway.
Q. Did you ever see anybody else's notices on the claim?
A. Smithy's. Walter Smithy's.
Q. When was that, do you know?
A. Well, it was some time after that. It was about the last trips that I made in there. I could not tell you just the year.
Q. Did you ever see the notices of any one else posted on this land or upon that quarter?
A. No, sir, not up to that time.
Q. Have you ever been up there since Mr. Reed went on the land—did you ever see him up there?
A. I never saw him up there. I met him on the trail going up there. I have been past the place, down through it, two or three different times. My work up there was cruising and on the way home why I would cut right through that place and follow that trail, and that is the way I came to be there the last time, in following this trail from the Reed place.
Q. What improvements are there on the land described as the northwest quarter of the northwest quarter—the southwest quarter [fol. 122] of the northwest quarter and west half of the southwest quarter of section 3?

Mr. Balmer: At the present time?

Q. When you saw it last.
A. State that again, please.
Q. I want to know what improvements there are——
A. (Interrupting:) Why, I don't remember of seeing any but a small cabin there.
Q. How long have you known Mr. Reed?
A. I think it was—I cannot tell that because I was first acquainted with him when he came there to Maple Falls.
Q. And that was several years ago?
A. Yes, sir. A good many years ago.
Q. Do you know where he has lived during that time?
A. Well, most of the time he has lived around Maple Falls. He had his home on this claim that he claimed there and he went backwards and forwards from one to the other.
Q. Do you know what property he is claiming?
A. Yes, sir.
Q. What is it?
A. Why, this homestead you mean?
Q. Yes.
A. The northwest quarter of the northwest quarter and the southwest quarter of the northwest quarter and the other two forty's, I don't know whether I could read them right off or not.

The Court: Referred to as the west half of the southwest.
The Witness: It would be the northwest quarter of the southwest

quarter and the southwest quarter of the southwest quarter. I think that is the description.

[fol. 123] Q. Do you know whether he has claimed this as a homestead?

A. He always has to me.

Q. Do you know whether anyone else -as ever occupied this land during the time that Mr. Reed has claimed it?

A. Not that I know of.

Q. You know Walter Smithy?

A. I am a little acquainted with him.

Q. Do you know anything about what he did upon the land, or anything about his claiming it?

A. Why, I knew that he had a notice on the corner there, and there was a little chopping done around and logs cut and rolled up as though they were commencing a cabin, or something of that kind.

Mr. Whitcomb: You may cross-examine.

Cross-examination.

By Mr. Balmer:

Q. You would not be sure, as I understand you, whether it was in 1901 or later that you first saw notices up there?

A. No. I would not be certain—or sure.

Q. Yes.

A. But it was about that time.

Q. You were in there, as I understand you, cruising and locating people from 1901 to 1904?

A. Yes, sir.

Q. And it was at some time in between those years that you saw these notices?

A. Yes, sir. It was my business to find out whether there was anybody on this land, or not, so that when parties came up, why, I could locate parties.

[fol. 124] Q. Yes.

A. And I made a practice of never putting but one settler on one piece of land.

Q. That was in the interests of peace and harmony, I take it?

A. Yes, sir.

Q. Mr. Whitcomb asked you a question about these four forty's that Reed claims—the four forty's that lie north and south along the west side of section 3.

A. On the west side of section 3?

Q. Yes. That is right, isn't it?

A. I think so.

Q. And he asked you what you had seen up there, and you said that you had seen a small cabin?

A. Yes sir.

Q. Which of the 40's is that cabin on?

A. It was on the northwest 40.
Q. It was on the northwest of the northwest of section 3?
A. Yes, on the northwest of the northwest.
Q. You never saw any cabin on the southwest of the northwest of section 3?
A. No.
Q. And there is not any cabin on that 40?
A. I don't know that there is.
Q. Do you know when Mr. Reed first began claiming this land?
A. No, I don't exactly.
Q. Do you remember when it was that you first knew that he claimed it?
A. Well, I could not tell that for a certainty because that was out of my line of business, and I kept no record of it.
[fol. 125] Q. What business did you follow after 1904?
A. Well, I had a little mill there at Maple Malls, and other business of that kind, and whenever any one came up from Seattle or any other place to be located, why, I would go out and show them the land.
Q. And in that way you sometimes went up the trail?
A. Yes, sir.
Q. On this land?
A. Yes, sir. I would very often go another way to the land that they wanted to see, and then on the way home come through that way because that was the nearest and easiest route.
Q. I see. Have you followed that business even up to the present time?
A. No, sir.
Q. Or up to recently?
A. No, sir.
Q. How long ago did you quit it?
A. I have not been following it for the last ten years anyhow.
Q. You have been upon this land in the last ten years, have you?
A. I hardly think so.
Q. Well, prior to these last ten years, as I understand you, you never saw Reed up there in the cabin at all, did you?
A. Not clear up to the place. I have seen him part way up there.
Q. On the trail down below there?
A. Yes, sir.
Q. Down toward the Nooksack?
[fol. 126] A. Yes, down towards the river.
Q. You met him once on that trail, as I understand it.
A. Oh, several times.
Q. Several times?
A. Yes, sir, at different times.
Q. You never saw Reed's family living on this claim, did you?
A. No, I never seen them. I never was on their place while they were living in the cabin. The trail that I spoke of before led me to the west of their improvements.

Q. How many times have you seen the improvements that they put on there?

A. Oh, a couple of times; that is all. That is, when he first went up there.

Q. How much ground did he have slashed at that time?

A. I don't know.

Q. Did he have any cultivation on the land at that time?

A. Not very much.

Q. What, if anything, did he have?

A. Well, I could not tell you, but I don't think that he had an acre.

Q. And if he had an acre do you remember how he had it cultivated?

A. No, sir.

Q. What he had sown?

A. No, because I generally was in a hurry when I came through there to get home, and I didn't stop to monkey with anything.

Q. Never any evidence of any of that land having been plowed?

A. No, I don't think so.

Q. You were living, as I understand, in 1901 and have con-
[fol. 127] tinued up to the present time to live in Maple Falls?

A. Yes, sir.

Q. Was Reed living down there in Maple Falls too?

A. He was there part of the time.

Q. Is he a married man?

A. Yes, sir.

Q. Where did his family live?

A. His family part of the time was up there in the woods—that is, that was the supposition. I didn't see him there. I saw him up on the trail. I sold him a pony some time ago, and I have seen him go up that trail with that pony, and I supposed he lived there.

Q. Did he keep a regular house down in Maple Falls?

A. No. They generally lived with some other party while they were there. Just as a stopping place, I would call it.

Q. Well, what part of the year would they spend down in Maple Falls?

A. Most any time—just whenever it happened—that is the way it looked to me.

Q. Would they be at Maple Falls for a considerable length of time?

A. Why, perhaps a day or two. and then off again.

Q. They were often down to Maple Falls for more than a day or two, weren't they?

A. The last year or so they have been there quite a good deal.

Q. Yes.

A. Right close to my residence.

Q. They live in a house down there, do they?

[fol. 128] A. Yes, sir. There is an old lady there—a widow woman that they stay there with quite a good deal.

Q. What business has Reed followed?

A. Well, it is in the woods—timber worker.

Q. He is a logger or lumberjack, or something of that kind?
A. Yes, sir, a logger. A skid road man, something of that kind.
Q. What is the character of this land—these four forty's that Reed claims—is it a nice level piece?
A. No, I don't call it level by a long ways.
Q. It is pretty steep and precipitous, isn't it?
A. Some of it is pretty steep and some of it is like rolling land, I should say.
Q. It is pretty heavily timbered all the way through, isn't it?
A. Some of it is. It has heavy timber on it.
Q. It is thickly timbered all over it, isn't it?
A. Yes, sir.
Q. Hardly any meadows there?
A. I don't think there are any meadows there.
Q. And it has a pretty gradual slant up the hill—pretty steep hill?
A. The lower 40 is kind of tipping up to the north, like, on the back, and then shoots up.
Q. Would you call it agricultural land?
A. Part of it is.
Q. Which part?
A. Well, the two lower 40's are a good deal—there is a good deal of agricultural land on it, if it was not for the timber that is on it.
[fol. 129] Q. It is timber land at the present time?
A. Yes, sir.
Mr. Balmer: That is all.
Mr. Whitcomb: That is all.

(Witness excused.)

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W. M. SMITHY, called as a witness on behalf of the plaintiffs, having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. What is your age, Mr. Smithy?
A. 39. I believe it was 1881 that I was born in.
Q. Where were you born?
A. Huntsville, Alabama.
Q. Where do you reside at the present time?
A. Concrete, Washington.
Q. What is your business?
A. Pool hall at the present time—running a pool hall.
Q. Are you acquainted with W. J. Tincker?
A. Yes, sir.
Q. Do you know Charles W. Reed?
A. Yes, sir.
Q. When did you first know Mr. Tincker?
A. In 1905.

[fol. 130] Q. Where did you live in 1905?

A. Maple Falls.

Q. Are you acquainted with the land described as the southwest quarter of the northwest quarter of section 3, township 39, range 6 east?

A. Yes, sir.

Q. Did you ever have any dealin-s with Mr. Tincker in regard to this land?

A. Yes, sir.

Q. What were they?

A. I bought his right—his squatter's right on this land.

Q. What time was that—when?

A. That was in 1906, in August.

Q. When you bought that did you receive from him any written document?

A. I received a receipt of a payment of five dollars in the woods.

Q. Do you know where that document is now?

A. No, sir, I don't.

Q. You have it?

A. No, sir, I have not.

Q. Do you know what the contents of it were?

A. Just a mere receipt showing that I had paid him five dollars in payment of this piece of land that he had turned over to me.

Q. Did it describe the land?

A. Yes, sir. It described this land.

Q. What did you do after purchasing his rights?

A. I tore his notices down and put mine up.

Q. When was that?

[fol. 131] A. That was right—it was in 1906—in August.

Q. Right at the time that you bought it?

A. Yes, right at the time that I bought it.

Q. You went on the land?

A. Yes, sir.

Q. With whom?

A. I was on there with Tincker—with Tincker and G. W. McLaughlin—George McLaughlin.

Q. What did you do when you went on the land?

A. I cleared a little piece, I would say almost a hundred feet square—cleared that away to build a cabin and cut down some timbers and sawed down a cedar tree and sawed it up to make shakes out of it to make a house.

Q. Do you know on which 40 this was on?

A. As I described it, on the second 40 back. That is, the northwest quarter of the southwest quarter, I think. I think that is right. As I described the land it is——

Q. (Interrupting.) Let me show you a plat here. I do not care to offer it at this time. May I show it to him?

Mr. Balmer: All right.

Q. Look at this plat, (showing plat to witness).
A. It is the southwest one quarter of the northwest one quarter, isn't it?
Q. Now, just look at this plat. This is section three (indicating).
A. That is this 40 (indicating).
Q. Here is the section, and it runs clear around like this (indicating).
A. Now, let me see. Here it is, right here (indicating). This is the section here. And this is the land, here (indicating). This [fol. 132] is the 40 that I built on, right there (indicating).

Mr. Balmer: I have no objection to your stating what it is.
Mr. Whitcomb: That is the southwest quarter of the northwest quarter.
The Witness: That is the southwest quarter of the northwest quarter. That is right. That is the spot where I started to build on.

Q. When you and Tincker went on the land first, did you go around it?
A. Yes, sir. I had taken it up different in a way than Mr. Tincker had it. I had taken it a mile long, where he had it and a mile square.
Q. But you included in what you took both the northwest quarter of the northwest quarter and the southwest quarter of the northwest quarter. That was included in the Tincker claim?
A. Yes, sir.
Q. And then you took the two quarters south of that?
A. Yes, south of that—lengthwise—north and south—running north and south.
Q. And you say that you posted your notices——
A. I took Mr. Tincker and Mr. G. W. McLaughlin around with me at the time that I posted my notices.
Q. What else did you do about this?
A. I slashed out some trail and blazed some trail and blazed in a trail from the line up to where I had started to build. I sawed this timber. I sawed down the cedar tree that was right close there, and I sawed it up to make shakes out of it, to house this building in at that time.
[fol. 133] Q. Did you have any transactions with Mr. Reed in regard to this?
A. Yes, sir.
Q. What was the transaction?
A. I released a squatter's right to Mr. Reed.
Q. Did he pay you something for it?
A. Yes, sir.
Q. When was this?
A. This was in 1906—in October.
Q. And when you did this did you give him a written transfer of your interest?
A. Yes. I went before a notary.
Q. Who?
A. That was Judge Hardin, I believe.

Q. Up at Kendall?

A. Yes. The old fellow—I mean old Judge Broyles. That is right, it was Judge Broyles.

Q. Did you go with Reed up to the place?

A. I did.

Q. What did you do when you went up there?

A. I took him up and I took him around and tore my notices down and he put his up, and we walked over this place, and he picked out the location where he built his cabin at the time.

Q. Did you know at the time that you bought this right of Tincker's, or up to the time that you transferred your right to Reed that the St. Paul, Minneapolis and Manitoba Railroad Company, or the Great Northern Railroad Company, made any claim to this land?

A. No.

[fol. 134] Mr. Balmer: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Balmer: Exception.

The Court: Note it.

A. No.

Q. Was any one else in the occupancy of this land, or any of it?

A. Not as I know of at all, no.

Q. Did any one, so far as you know—any one else make any claim to any part of this land at that time?

A. No, only Tincker and myself, and Mr. Reed at this time.

Q. Do you know what Reed did after he purchased your right?

A. Yes, sir.

Q. What did he do?

A. He went right up there and he went to work to build this house that he lives in. He hired a man that he took with him, a fellow by the name of Johnson.

Q. Do you know whether he moved on to the land?

A. Yes, sir. He moved right on to it just as soon as his house was finished. He packed a lot of stuff on his back up there right away—while he was building—while going back and forth and building, bedding and cooking utensils.

Q. Have you been up there since he was on it?

A. A number of times, yes, sir.

Q. And what did you see when you went there in the way of improvements?

A. Well, he has quite a slashing there. He has an acre and a half in cultivation and he has fruit trees, berries and onions. I have [fol. 135] eaten a good many meals out of his own garden, things that were raised up there on this place.

Q. Has he a house there?

A. Yes, sir.

Q. How much of a house?

A. Well, it is—let me see—it is—he has four rooms in the house.

Q. Do you know if he has a family?
A. Yes, sir, he has.
Q. Does the family live there?
A. Yes, sir.
Q. Of whom does the family consist?
A. His wife and himself.
Q. Has he children?
A. Yes, sir. He had one daughter—his youngest daughter lived up there until she got married.
Q. When were you last there?
A. I was there last, last June.
Q. And at how frequent intervals before that time have you been there?
A. Well, once a year anyway. I was up there I will say once a year. I just don't remember what times they were that I was there, but I was there—I visited him once a year.
Q. And you visited him at his house?
A. Yes, sir. I visited Mr. Reed at his house.
Q. Did you ever stay there over a night?
A. I have, several times. Very nearly every time I went up I stayed with Mr. Reed from one night to three nights at his place.
[fol. 136] Q. Do you know whether he was claiming this property as his own?
A. Yes, sir. He was claiming it as his own, as a homestead.
Mr. Whitcomb: You may take the witness.

Cross-examination.

By Mr. Balmer:

Q. This little place that you cleared up was not near where Tincker had put down the poles for the foundation of a cabin?
A. No, sir.
Q. That place was up on the northwest quarter, wasn't it?
A. Which place was this that you have reference to?
Q. Tincker's place.
A. Yes, that was on the northwest quarter.
Q. It was on the first 40 up from the railroad?
A. Yes. That is the way I describe the land. I call that the front 40.
Q. I see. And this was on the second 40?
A. Yes. Mine was back on the second 40 about 200 yards from the line.
Q. Two hundred yards from the west line?
A. About two hundred yards.
Q. From the west line of the section?
A. It was more than that. It was about 500 yards.

The Court: From what?
The Witness: From the section line. About 500 yards back, if I remember right.

Q. Well, I don't want to take any advantage of you. If it was [fol. 137] 500 yards back from the section line it would be off this 40, and I don't think as a matter of fact that it is. 500 yards is 1500 feet.

A. Yes, that is right. That is across the 40.

Q. Yes.

The Court: About 1320 would be across the 40.

Mr. Balmer: Yes.

A. Well, this was about 500—let me see. I have stepped that across there, but I have forgotten just how it was, but I have been on there after it was measured. I know that I was back on the second 40.

Q. You were beside the little creek that runs up there?

A. Yes, sir.

Q. Now, that place that you slashed was about 100 feet square?

A. Yes, about 100 feet square.

Q. And besides slashing that you cut down one cedar tree?

A. I cut down several trees.

Q. But you cut down one big cedar tree?

A. I cut down one big cedar tree to make shakes.

Q. And you sawed that into lengths to make shakes?

A. Yes, sir.

Q. You never split any trees?

A. No, sir.

Q. The tree still lies there?

A. Yes, sir.

Q. You never planted anything there?

A. No, sir, I never planted anything there.

Q. And you never built anything on the land?

A. No. I just cleared away a place to build, and started to [fol. 138] build.

Q. Are you a married man?

A. Yes, sir.

Q. Were you married at that time?

A. Yes, sir.

Q. Did you ever take your family to live up there?

A. No. I never took my family up there to live. I had no place to live there at that time.

Q. No place to live?

A. No, sir.

Q. Where were you and your family living at the time you did this work?

A. Maple Falls.

Q. And as I understand, during the time you had it—between the time that you got it from Tincker and the time that you sold it to Reed, neither you nor your family ever went there to live there?

A. No, I didn't say that. I said that I claimed the land.

Q. But I say that neither you nor your family ever went up there to live there?

A. I never went there to live there, because I didn't have any place to live there at that time, no. But I went up there to work on it.

Q. How much did you give Tincker for the land?

A. $25.

Q. And he gave you a receipt for five of it?

A. Yes, sir. That was in the woods.

Q. Now, you say you went up and tore down Tincker's notices?

A. Yes, sir, right at the time.

Q. How many notices did you tear down?

[fol. 139] A. Four.

Q. Four?

A. Yes, sir.

Q. Did he have four notices on this land that you were claiming?

A. No.

Q. Where were his four?

A. His land lay in a square.

Q. Did you go around and tear down the notices off his land that you were claiming?

A. Yes, I did. I and he went on it together. He said that he didn't own any land now, and he tore them right off.

Q. He tore off the four notices, then, that were around the northwest quarter of section 3?

A. Yes, sir.

Q. And where did you put your notices?

A. I put mine on the northwest of the southwest—the southwest of the northwest.

Q. You put up——

A. (Interrupting.) That is, the south half of section 3 and the mile strip.

Q. How many notices did you put up?

A. I put up four.

Q. Did you find some posts where you put them up—find any survey monuments?

A. I found the corner post and quarter post where this was put up and witness trees. The quarter post, I stepped it off as near as I could get it a quarter wide and I put up notices—blazed and put them up.

Q. So at two places where you put up notices there were not [fol. 140] any monuments or posts?

A. No, there were not.

Q. How much time did you spend up there doing this clearing, or this slashing or cutting?

A. I was there five days.

Q. Five days?

A. Yes, sir.

Q. What occupation were you following at that time?

A. Well, at this time I was not working.

Q. That is, you were not following any occupation at the time you were up there those five days?

A. I was not working. I was figuring on getting on to this as a homestead.

Q. I see. Well, what did you do then after those five days?
A. Well, I went to work for Joe Bowman, driving a team.
Q. Did you do this slashing just after you bought from Tincker?
A. Yes, shortly after that.
Q. About what time did you buy from Tincker?
A. I bought from Tincker in August.
Q. And you claimed the land until about November?
A. Yes, sir.
Q. During that time you spent these five days up there?
A. No. I was up there every week. I made a trip to it every week.
Q. What did you do when you made those trips?
A. I swamped out trees and blazed out roads.
Q. Besides these five days that you spent there doing this slashing how many days at a time would you be up there—just one day?
[fol. 141] A. One day. At the time I would spend once a week going in there.

The Court: You mean at first you were up there about once a week?
The Witness: I was up there once a week. At first when I bought it I went right up there and worked five days slashing.
The Court: And following on for some length of time you went up there once a week?
The Witness: I went up there once a week.

Q. Up to the time you sold out to Reed there weren't any cabins on the land at all, were there?
A. No, nothing, only what I had started and what Tincker had started. No cabins at all.
Q. What did Tincker's place look like?
A. He had, if I remember right, three poles on one side and two poles in the front part of it. It was three poles high—highest on one side, and the balance of it was two poles around.

The Court: It was a log cabin?
The Witness: It was a log cabin that he started.
The Court: Morticed at the end?
The Witness: Notched in. He had just started to build.

Q. Reed was living down at Maple Falls?
A. At this time?
Q. Yes.
A. Yes, sir.
Q. And you sold out to Reed?
A. Yes, sir.
Q. For how much?
[fol. 142] A. $50.
Q. You made 100%.

The Court: But he did that work.
The Witness: I did that work, and I sold out to him for $50.
Mr. Balmer: I was just going to ask him if that work was worth the balance of the $50.

The Witness: Of course it is not asked me, but I would not have sold except for conditions. I had sickness in my family at that time and a child birth, and I figured that my wife was liable to die at that time, and that was the reason I sold it. I would be fighting it just the same as Mr. Reed is today for that claim if that was not the case.

Q. How long after you sold out to Reed did you continue to live at Maple Falls?
A. After I sold out to Reed?
Q. Yes.
A. I lived there until 1909.
Q. Then you moved away?
A. Yes, sir.
Q. You haven't lived there since?
A. No, I haven't lived there since.
Q. What has taken you up over the Reed land when you have been there?
A. Just as a visit. Me and Reed is friends, and it has been just friendship.

The Court: You are not related?
The Witness: Not related at all.

Q. Did you do any hunting together?
A. No—well, I have hunted with Mr. Reed probably, but then [fol. 143] those trips that I have taken up there has been just visits—up to visit Mr. Reed.
Q. You have been good friends, I should judge, and are now?
A. We are.

Mr. Balmer: That is all.

Redirect-examination.

By Mr. Whitcomb:

Q. Do you know what was done with Tincker's notices on this land when you tore them down?
A. Tore them up and destroyed right there those notices.

Mr. Whitcomb: I want to ask him about the location of this cabin.
Mr. Balmer: Which cabin?
Mr. Whitcomb: The cabin that he started.
Mr. Balmer: I guess that he did not start one.
The Witness: Me?
Mr. Balmer: Yes.
The Witness: Yes, I started a cabin. That is, I cleared away.
Mr. Balmer: I asked him where it was that he cut down this tree.
The Witness: I cleared it away to build a cabin, and I cut some timbers. That was my intentions.

Mr. Whitcomb: That was what I meant.
Mr. Balmer: All right.

Q. Now, where was that? I will show you this map and you can tell me where it was on this map (showing map to witness).
A. That was right here (indicating).

The Court: Better identify that map.
[fol. 144] The Witness: There is a little creek running right down through here (indicating). It was right there (indicating). Right there is where my cabin was (indicating). That is the little creek here (indicating).

Q. That is on the southwest quarter of the northwest quarter?
A. That is right where my cabin was started (indicating). That is where it was (indicating).
Q. It is on the southwest quarter of the northwest quarter then, is that right?
A. Yes, sir.
Q. I want to ask you, Mr. Smithy, one other question. Mr. Smithy, had you taken any Government land or did you have any before you bought this land from Mr. Tincker?
A. No, sir.
Q. This is the only Government land you had ever claimed?
A. Yes, sir. I never used any of my rights at all.
Q. The only Government land you had ever claimed up to that time?
A. Yes.

Mr. Whitcomb: That is all.

(Witness excused.)

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[fol. 145] Edmond Magner, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. Where do you live, Mr. Magner?
A. Maple Falls.
Q. On a farm or a ranch?
A. On a homestead.
Q. How long have you lived there?
A. A little bit over 13 years.
Q. Do you know Charles W. Reed?
A. Yes, sir.
Q. How long have you known him?
A. I have known him since the fall of 1906—the latter part of the summer of 1906.

Q. Where did you first know him—where did you first see him?
A. In Maple Falls.
Q. Are you acquainted with the land described as the southwest quarter of the northwest quarter of section 3, township 39, north of range 6 east?
A. Yes, sir.
Q. Where does that lie with reference to your land?
A. How is that?
Q. Where does it lie with reference to your land?
A. It adjoins me on the east.
Q. Did you ever see Mr. Reed on this land that I have described?
[fol. 146] A. Yes, sir.
Q. Do you know when he went on that land?
A. He went on there some time in September or October, 1906.
Q. Do you know for what purpose he went on?
A. For to take up a homestead.
Q. What land did he claim, if you know, for a homestead?
A. The west half of the west half of section 3.
Q. And do you know what he did when he first went on there?
A. Sir?
Q. Do you know what he did when he first went on there—what did Mr. Reed do?
A. Oh, after he got the trail blazed he began his improvements—putting up a house.
Q. Well, did he construct a house there?
A. Yes, sir.
Q. When did he have it completed?
A. Along in March, part of it, and he got through with the first house—the first house that was put up was a shed like, along in March, and then he afterwards built an addition of three rooms on to that.
The Court: When was that? Would that be March, 1907?
The Witness: Yes, sir.
Q. Did he move his family in there?
A. Yes, sir.
Q. When?
A. Along in March or April—along at that time.
Q. Where has Mr. Reed and his family lived since that time?
A. They have lived there. That is, they have made that their home ever since.
Q. Have they been on there continuously since that time?
[fol. 147] A. Yes, excepting when their business or occupation called them away somewhere else, or when they had to go out to work, you know.
Q. But they have never been away for any permanent stay, have they?
A. Oh, no.
Q. What family does Mr. Reed have—what family did Mr. Reed have there on the place?
A. He and his wife and daughter and his two sons, I think, stay-

ing with him there one winter continually, and then they were there at intervals since then until they got married.

Q. Do you know where Mr. Reed and his wife live now?

A. Why, I see him—he comes and stops at my place. He is in and out over Sunday.

Q. He goes in and out to this place?

A. Yes, sir. He goes to his garden and works on his spuds and works on his garden the same as you would. I saw him last Sunday.

Q. What improvements has he made upon the place?

A. He has done some slashing, clearing land and setting out fruit trees and shrubbery and the necessary buildings—buildings that he put on as he saw was necessary, and there is a woodshed and a barn and the like of that.

Q. Are there trails and roads on the property?

A. Yes, sir.

Q. Where do these run?

A. One to the north and one to Maple Falls.

Q. Does he have a trail down through the homestead?

A. Yes, sir.

[fol. 148] Q. It runs down across this southwest quarter of the northwest quarter to the railroad's piece?

A. Yes, sir.

Q. During this time, since Mr. Reed went on there, has any one else occupied any part of this property that Mr. Reed has claimed as a homestead?

A. No, sir, not that I know of, and I never did know of.

Q. Do you know that Mr. Reed during this time since he went on there—during all this time since he went on there, that he has claimed the west half of the west half of said section 3 as a homestead?

A. Yes, sir. He never claimed anything else.

Q. Mr. Magner, did you file upon your land and Mr. Reed make the filing upon this land at the same time in the Land Office?

A. Yes, sir.

Q. On the same day?

A. On the same day we made application for this land, and we saw in the Land Office that all lands in 39-6 and 39-7 would be thrown open for settlement—for homesteaders only on that day.

Q. You say that you saw that in the Land Office?

A. Yes, sir, in Seattle. It was also posted over the post office window in Maple Falls, that all lands in 39-6 and 39-7 would be thrown open for settlers February 6, 1907.

Q. Do you know whether Mr. Reed was informed at the time of his filing of any claim of the St. Paul, Minneapolis and Manitoba Railroad Company to the 40 that is here in question.

Mr. Balmer: Just a minute.

[fol. 149] A. No.

Mr. Balmer: Just a minute. I move to strike out the answer.

The Court: It will be stricken.

Mr. Balmer: And I object to the question on the ground that it is incompetent, irrelevant and immaterial and necessarily based on hearsay, and not the best evidence.

Mr. Whitcomb: But then I asked him if he knew that Mr. Reed was informed at the time that he went to make his filing.

Mr. Balmer: Whether he knew it or not would be utterly immaterial.

The Court: Well, if he knew or had any information imparted to him, he can tell about that.

Mr. Balmer: Well, it would be hearsay.

The Court: Oh, no, it would not necessarily be hearsay. If he heard the Department advising him, or anything of that kind, he can state.

Mr. Balmer: I object to it on the grounds stated.

The Court: He can answer it, if he knows.

Mr. Balmer: Exception.

Q. Will you answer the question, Mr. Magner.

A. I beg your pardon but what was it.

Mr. Whitcomb: We will have the question read.

(Question read as follows: Do you know whether Mr. Reed was informed at the time of his filing of any claim of the St. Paul, Minneapolis and Manitoba Railroad Company to the 40 that is here in question?)

Mr. Balmer: Same objection.

The Court: He may answer.

Mr. Balmer: Exception.

[fol. 150] A. No, sir.

The Court: As I understand it, that is not a state of mind of Mr. Reed, but what was done?

Mr. Whitcomb: I want to know if the Land Office told Reed.

The Court: That is the way I understood the question.

Q. Were you there present when Reed filed his application at the Land Office?

A. Yes, sir.

Q. Do you know whether the Registrar and Receiver of the Seattle Land Office accepted his application?

Mr. Balmer: I object to that upon the ground that it is not the best evidence.

The Court: I do not believe it is.

Mr. Balmer: And incompetent, irrelevant and immaterial

Q. Well, do you know whether they received his application?

Mr. Balmer: Same objection.

The Court: The physical act?

Mr. Whitcomb: Yes.

The Court: I think he may answer that, if he knows.

A. They received—they heard his application—heard him make the application, but they claimed that they did not have his certificate and they claimed that he was in conflict with another homesteader.

Q. Who was the other homesteader, if you remember?

Mr. Balmer: I object to that as not the best evidence.

The Court: If they made the statement to him he can state.

Mr. Balmer: And I object further on the ground that it is incompetent, irrelevant and immaterial.

The Court: I do not know whether it is material, but what was said and done there might have some bearing as affecting Reed. [fol. 151] It cannot be prejudicial. Go ahead and we will find out what the statement was.

Mr. Balmer: Exception.

The Court: Note it.

Q. Who was the other homesteader, if you remember?

Mr. Balmer: I object to that as incompetent, irrelevant and immaterial.

The Court: This is the same question. Objection overruled.

A. Henry Lester, I think.

Q. May I refresh your memory. Was it Carlson?

A. No, I forget the name, but it is a homesteader anyway.

Q. It was not the railroad company?

A. Sir?

Mr. Balmer: I object to that as incompetent, irrelevant and immaterial, and leading.

Mr. Whitcomb: I don't care. He said that it was a homesteader, so I don't care.

The Witness: He was rejected on the ground that he was conflicted by another homesteader. I know that positively.

The Court: We will adjourn now.

(Adjournment taken at 12 o'clock m. to 1:30 p. m. of the same day.)

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1:30 p. m.

Court convened pursuant to adjournment.

All parties present.

EDMOND MAGNER resumed the stand for further direct examination by Mr. Whitcomb.

Q. Mr. Magner, when did you first here or learn that the St. Paul, Minneapolis and Manitoba Railroad Company was making [fol. 152] any claim to the land here in question?

Mr. Balmer: Objected to as irrelevant and immaterial.

The Court: He may answer it and we will see what comes out of it.

Mr. Balmer: Exception.

A. Well, it was along in 1910 that Mr. Reed—long in 1910 or 1911 that Mr. Reed had a hearing in Seattle——

Mr. Balmer (interrupting): Just a minute. The witness is going much further than simply answering the question.

Q. Mr. Magner, I don't want you to tell all that. All I want to know of you is—I will put my question in another way.

The Court: You mean you will withdraw this question?
Mr. Whitcomb: Yes, I will withdraw the question.
The Court: The answer will be stricken and the question withdrawn.

Q. Did you ever hear or know of any claim being made by the St. Paul, Minneapolis and Manitoba Railroad Company to the land here in question prior to the time when Mr. Reed made his filing in the Land Office?
A. No, sir.

Mr. Balmer: Objected to as irrelevant and immaterial.
The Court: He may answer.
Mr. Balmer: Exception.

A. No, sir.
Q. Do you know, Mr. Magner, whether Mr. Reed has at all times since he went on this land claimed the same in hostility to the St. Paul, Minneapolis and Manitoba Railway Company and the Great Northern Railroad Company?

Mr. Balmer: Objected to as calling for the conclusion of the [fol. 153] witness, and leading and suggestive.
The Court: It strikes me that the objection is good to that.

A. I don't quite understand the question.

Mr. Balmer: I object to that.
Mr. Whitcomb: Just a minute, Mr. Magner. Well, perhaps——
The Court (interrupting): You have shown what he did up there, and where he lived and all those things, and anything after that would be his conclusion, would it not?
Mr. Whitcomb: Well, perhaps the question whether the occupation of it was hostile is a conclusion for the court to draw from the circumstances.
The Court: Yes, from the facts and circumstances in the case.
Mr. Whitcomb: You may take the witness.

Cross-examination.

By Mr. Balmer:

Q. What land do you live on, Mr. Magner?
A. I live on the west—on the east half of the east half of section four.
Q. That runs right alongside of this land that Reed claims?

A. Yes, sir.
Q. With the section line between?
A. Yes, sir.
Q. How long have you lived up there?
A. I have lived there since August 18, 1906.
Q. Did Reed go on his land after you went up on yours?
A. Yes, sir, shortly afterwards.
Q. What 40 are Reed's improvements on—that is, what 40 is his cabin on?
A. It would be on the northwest one quarter of the northwest one [fol. 154] quarter of — three.
Q. He has not got any buildings on any other 40 than that one?
A. No.
Q. There is no fence around his land, of course.
A. No.
Q. You don't mean to say that there are any roads on Reed's claim?
A. Any what?
Q. Any roads.
A. There are trails.
Q. There are trails?
A. Yes, sir.
Q. But there are not any wagon roads up there?
A. No, sir.
Q. How does this land lie, flat or is it hilly?
A. Well, it is comparatively flat.
Q. Comparatively flat, did you say?
A. Yes, sir.
Q. Comparatively with what?
A. Well, with the land that is in the same vicinity.
Q. How big a place has Reed got slashed?
A. About five acres slashed, and there is about an acre in cultivation—that is, that he uses for a garden.
Q. Well, even on this acre that is in cultivation there are stumps in that part of it, aren't there?
A. There are a few.
Q. He has not got an acre all clear of stumps?
A. Not all in one body.
Q. There are places in between the stumps where he puts in a lit- [fol. 155] tle garden of potatoes and other vegetables; is that right?
A. Yes, sir.
Q. That clearing is down in the northwest of the northwest of three, isn't it——
A. (Interrupting.) Yes.
Q. —that slashing?
A. Yes, sir.
Q. You and Reed are friends, are you?
A. Well, to the best of my knowledge we are. I don't know how the other party feels.
Q. You feel friendly towards him?
A. Yes, sir.

Q. Reed put the first buildings on that land, didn't he?
A. Well, there was one or two others partly on different sections before Reed—there was two others under construction before Reed began his.
Q. Who did you speak of now, Tincker and Smithy?
A. Yes, sir.
Q. Outside of what they had on there there was not anything at the time that Reed started?
A. No, aside from what they had, no.
Q. He was the first man to build a complete cabin on the place, wasn't he?
A. Yes, sir.
Q. Yes.
A. Yes, sir.

Mr. Balmer: That is all.

(Witness excused.)

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[fol. 156] C. W. STUDEBAKER, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. What is your name?
A. C. W. Studebaker.
Q. Where do you live, Mr. Studebaker?
A. Chehalis at present.
Q. What is your business?
A. Shingle mill business.
Q. You are acquainted with Charles W. Reed, the plaintiff here?
A. Yes, sir.
Q. Do you know the land in controversy in this action?
A. Yes, sir.
Q. Have you been on it?
A. Yes, sir, several times?
Q. When did you first see it?
A. I would say along in 1909, I think, was the first time I was first up there—in the fall of 1909.
Q. Where did you live at that time?
A. Castle Rock.
Q. Have you been on there since that time?
A. Yes, sir.
Q. How many times?
A. Oh, several times—five or six different times anyway—probably once a year.
Q. When you have been on this land was Mr. Reed living there?
[fol. 157] A. Yes, sir, always.